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UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Docket No. 13,447

AMERICAN & EUROPEAN AGENCIES, INC.,
Appellant,

against

WHITNEY H. GILLILLAND, PEARL CARTER PACE and HENRY J. CLAY, constituting the Foreign Claims Settlement Commission of the United States, et al.,
Appellees.

JOINT APPENDIX

United States Court of Appeals
For the
District of Columbia Circuit
FILED AUG 23 1956
Joseph W. Stewart
CLERK

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Complaint

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 247-55

AMERICAN AND EUROPEAN AGENCIES, INC., a New York corporation, having its principal office at 488 Madison Avenue, New York 22, New York,

Plaintiff,

against

WHITNEY H. GILLILLAND, PEARL CARTER PACE and HENRY J. CLAY, constituting the Foreign Claims Settlement Commission of the United States, and GEORGE M. HUMPHREY as Secretary of the Treasury of the United States of America,

Defendants.

AMERICAN AND EUROPEAN AGENCIES, INC., by its attorney, PERCY A. SHAY, for its complaint herein alleges:

(1) The plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of New York.

(2) The defendants WHITNEY H. GILLILLAND, PEARL CARTER PACE and HENRY J. CLAY are members of the Foreign Claims Settlement Commission of the United States (hereinafter referred to as the "Commission") established pursuant to Reorganization Plan Number 1 of 1954 adopted under the Reorganization Act of 1949, as amended (5 USCA

133z et seq.), and are sued in their official capacity as the Foreign Claims Settlement Commission of the United States. Pursuant to said Reorganization Plan, all functions of the International Claims Commission established by the International Claims Settlement Act of 1949, as amended (21 USCA Section 1621, et seq.), were transferred to the Commission.

(3) The defendant GEORGE M. HUMPHREY is the Secretary of the Treasury of the United States and is sued in his official capacity as such.

(4) As hereinafter more fully appears, this action arises under the International Claims Settlement Act of 1949, as amended (21 USCA Section 1621 et seq.) (hereinafter referred to as the "Act"), and under the "Agreement between the Government of the United States of America and the Federal Peoples Republic of Yugoslavia regarding pecuniary claims of the United States and its nationals" signed July 19, 1948 and entered into force July 19, 1948 (hereinafter referred to as the "Yugoslav Claims Agreement"). The matter in controversy exceeds, exclusive of interest and costs, the sum or value of Three Thousand Dollars ($3,000.).

(5) Pursuant to the provisions of the Act, the Commission was given jurisdiction to receive, examine, adjudicate and render final decisions with respect to claims of nationals of the United States included within the terms of the Yugoslav Claims Agreement.

(6) Pursuant to the provisions of the Act and the rules and regulations of the Commission adopted and promulgated thereunder, plaintiff duly filed with the Commission on or about the 31st day of May, 1951, a claim included within the terms of the Yugoslav Claims Agreement requesting compensation in the amount of $2,157,539.50 for the nationalization or other taking by the Government of Yugoslavia

of property indirectly owned by the plaintiff through the ownership of 61.6% of the issued and outstanding stock of FALLERSA, an Italian corporation, which was the direct owner of such property. Thereafter said claim was amended to reduce the amount of compensation requested to $1,538,753.52. Simultaneous with the filing of said claim and from time to time thereafter, plaintiff filed with the Commission and the Commission received numerous documents, declarations, sworn statements and other evidence and written legal contentions in support of such claim. On or about the 26th day of November, 1954, the Commission issued a so-called Proposed Decision (Decision No. 1533) under which Plaintiff's claim was denied by the Commission. The said Proposed Decision denied plaintiff's claim on the grounds that "the transaction (i.e. the purchase by the plaintiff of shares of the outstanding stock of FALLERSA) was speculative and involved an illegal payment and that any award of over $20,000 would be subject to the demand of foreign citizens." The said Proposed Decision contained no reference whatever to the value which the plaintiff's claim would have if allowed, or to the manner in which or the findings upon which such value would be determined by the Commission.

(7) Thereafter, pursuant to the rules and regulations promulgated by the Commission, plaintiff, through its attorneys, duly filed with the Commission and the Commission duly received objections to the denial of the claim, together with an assignment of the errors relied upon, an accompanying brief in support thereof and a request for a hearing on the claim for the purpose of taking evidence upon the errors assigned. The Commission thereafter granted the plaintiff's request for a hearing for the purpose of taking evidence on the errors assigned which errors related soley to the issue of the validity of the claim and not to the value of the claim, validity being the only issue raised in the Proposed Decision. Such hearing was

held on the 22nd day of December, 1954 before Harry N. Stein, an examiner designated by the Commission. At the opening of the said hearing, counsel for the Commission, designated by it pursuant to its rules and regulations to represent the public interest opposed to the allowance of any unjust or unfounded claim or portion thereof, stated in effect that a certain employee or certain employees of the Commission had prepared a report on the plaintiff's claim in which it was stated that plaintiff's claim had a "nominal value" only and that, accordingly, even if the so-called Proposed Decision of the Commission were reversed after the hearing and upon reconsideration of the claim by the Commission, the claim would probably be allowed by the Commission for only a nominal sum in relation to the full amount claimed. Thereupon, plaintiff's attorneys requested that they be advised of the manner in which determination of such nominal value would be made by the Commission, the evidence upon which the same would be based, and the legal contentions in support thereof. Plaintiff's attorneys also objected to counsel's remarks on the grounds that the hearing related soley to the issue of the validity of the claim; the value thereof not having been questioned by the Commission in its Proposed Decision. However, both the attorney for the Commission and the Examiner presiding at the hearing failed and refused to disclose such information to the plaintiff or the plaintiff's attorneys, and failed and refused to submit at the hearing any documents, statements, testimony or other evidence concerning the value of plaintiff's claim or the manner in which the same would be determined or to state the legal contentions upon which such determination of value would be based except a statement that the value of the claim would be computed on the basis of the net worth of the stock of FALLERSA owned by the plaintiff. Thereupon, plaintiff's attorneys made application to the Commission for a hearing on the issue of the value of the plaintiff's claim,

such hearing to be granted in the event the plaintiff's claim was approved by the Commission for less than the full amount thereof. The said application was denied by the Commission on December 30, 1954 and notice of such denial was received by the attorneys for the plaintiff on December 31, 1954.

(8) On or about December 30, 1954, the Commission issued its Final Decision on plaintiff's claim in which decision the Commission reversed the determination made in the Proposed Decision and approved the plaintiff's claim. However, the Commission determined that the value of said claim amounted to only $12,300. and made its award in that amount. Thereafter, and on or about the 7th day of January, 1955, plaintiff renewed its application to the Commission for a hearing on the issue of the value of the claim and duly filed with the Commission objections to the Final Decision assigning the errors relied upon. The Commission has failed and refused and continues to refuse to act upon plaintiff's said application.

(9) The Act requires that each claimant before the Commission whose claim is approved for less than the full amount thereof be afforded a hearing before the Commission on the issue of the value of such claim after having been notified by the Commission of the amount for which such claim is approved and the reasons and grounds for such decision as to the amount of the claim. Accordingly, the Commission's denials of the plaintiff's applications for a hearing on the issue of the value of the claim are in violation of the provisions of the Act and in violation of the rights granted to the plaintiff under such Act and the Final Decision and Award of the Commission is therefore null and void.

(10) It appears from the Final Decision issued by the Commission that the Commission has determined the value of plaintiff's claim in a wholly arbitrary and capricious

manner and in complete disregard of the evidence and written legal contentions presented to the Commission and the results or an independent investigation of the case made by the Commission and its agents in that the Commission determined the value of the claim on the basis of a valuation of the properties of FALLERSA taken by the Yugoslav Government amounting to approximately $84,000 whereas the uncontradicted evidence in the record and the results of the investigation of the case made by the Commission proved that the properties had a value of between $315,576.96 (the appraisal made by the Yugoslav Government) and $1,514,537 (the plaintiff's appraisal). Accordingly, the action of defendants WHITNEY H. GILLILLAND, PEARL CARTER PACE and HENRY J. CLAY in approving plaintiff's claim for the sum of only $12,300 is in excess of the authority conferred upon them under the provisions of the Act and a patent abuse of the discretion vested in them under the Act.

(11) Pursuant to the provisions of the Act, GEORGE M. HUMPHREY, as Secretary of the Treasury of the United States, is authorized and directed to pay out of the Yugoslav Claims Fund established under the Act to claimants whose awards have been certified to him by the Commission pursuant to Section 5 of the Act, certain sums which are to be computed on the basis of the awards certified to the said defendant by the Commission. On information and belief, many awards in addition to the award made to the plaintiff and hereinabove referred to have been certified by the Commission to the said defendant and the total amount of such awards far exceeds the funds in the said Yugoslav Claims Fund. Therefore, the Yugoslav Claims Fund will be insufficient to pay all awards of the Commission in full and, in accordance with the provisions of the Act, the said defendant will pay on such awards only a pro rata part thereof, which part will be computed on the basis of the total

amount of all awards certified to the said defendant by the Commission. Unless the said defendant is enjoined by this Court from paying out of the Yugoslav Claims Fund amounts which would decrease the fund to an amount less than the full amount of the claim of the plaintiff herein, the Yugoslav Claims Fund may be fully depleted before the plaintiff's claim can be determined by the Commission in accordance with the provisions of the Act and distribution of the Yugoslav Claims Fund will be made on the basis of an illegal and void award. In effect, therefore, the rights granted to the claimant under the Act will be completely defeated.

(12) Plaintiff has no adequate remedy either at common law or under the statutes. The Act prohibits review by the courts of the decisions of the Commission and the decision of the Commission on the plaintiff's claim is not, therefore, appealable or reviewable under the statute and the plaintiff has no remedy except through the aid of the equitable process of this Court.

WHEREFORE, the plaintiff prays:

(1) That the Final Decision of the Foreign Claims Settlement Commission in Claim No. Y-647, Decision No. 1533, and the certification of the award thereunder pursuant to Section 5 of the International Claims Settlement Act of 1949, be declared to be arbitrary, contrary to law, and null and void and that the said Commission be required to declare the same as ineffective and be required to grant to the plaintiff a hearing on the issue of the value of said claim, and subsequent to such hearing be required to decide such claim in accordance with the provisions of the Act and on the basis of such evidence and written legal contentions as may have been presented to the Commission and upon the results of the independent investigation of the case made by the Commission, and to certify the award

made in accordance with such decision to the Secretary of the Treasury of the United States in accordance with the provisions of Section 5 of the Act.

(2) That until final disposition of the claim by the Commission in accordance with the provisions of the Ac the defendant GEORGE M. HUMPHREY, as Secretary of the Treasury of the United States, be enjoined and restrained from making payments out of the Yugoslav Claims Fund which would reduce the total amount in such fund to a sum less than $1,538,853.52.

9) (3) For such other and further relief as to the Court may seem just and proper.

/s/ PERCY A. SHAY

Percy A. Shay
Attorney for Plaintiff
Office & Post Office Address
777 14th Street, N. W.
Washington 5, D. C.

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO. 247-55

AMERICAN AND EUROPEAN AGENCIES, INC.,
Plaintiff,

v.

WHITNEY H. GILLILLAND, et al.,
Defendants,

FIRST DEFENSE

This Court is without jurisdiction to review the action of the defendants.

SECOND DEFENSE

The complaint fails to state a claim upon which relief may be granted.

THIRD DEFENSE

Answering specifically the numbered paragraphs of the complaint, defendants aver:

1., 2., 3., 4., and 5. Admitted.

6. The allegations contained in paragraph 6 of the complaint are admitted except it is denied that the Commission's proposed decision contained no reference to the value of plaintiff's claim.

Answer

7. The first two sentences of paragraph 7 of the complaint are admitted except any implication contained therein that the issue of valuation was to be excluded from the hearing is denied. Defendants aver that plaintiff was invited by the Commission to submit evidence of valuation and to argue the question of valuation. The third sentence of paragraph 7 is admitted. The fourth sentence of paragraph 7 is admitted, except it is denied that the attorney for
11) the Commission stated that the claim, if allowed, would probably be allowed for only a nominal sum. On the contrary, the attorney for the Commission stated:

> "There has been no finding whatsoever with respect to either of these claims by the Commission as to value. There has been a memorandum by an expert, hired by the Commission, as to his views."

The fifth sentence of paragraph 7 of the complaint is denied. The sixth sentence of paragraph 7 of the complaint is denied and defendants aver that plaintiff's attorney himself argued the question of valuation. The seventh sentence of paragraph 7 of the complaint is admitted except it is denied that the hearing examiner and the attorney for the Commission refused plaintiff anything. The remaining allegations of paragraph 7 of the complaint are admitted.

8. Admitted.

9. The allegations contained in paragraph 9 of the complaint are conclusions of law which defendants are not required to answer. Defendants aver that plaintiff has received every right to which it was entitled under the International Claims Settlement Act of 1949.

10. Denied. The net worth of the property in question was computed on the basis of evidence filed by plaintiff.

11. The first three sentences of paragraph 11 of the complaint are admitted. The fourth sentence contained

therein is admitted, except defendants deny that plaintiff's claim was not determined in accordance with the provisions of the Act as intended by Congress, and it is denied that the distribution of the Yugoslav Claims Fund will be made on the basis of an illegal and void award. The fifth sentence of paragraph 11 is denied.

12. The first sentence contained in paragraph 12 of the complaint is denied. The second sentence is admitted except defendants deny that the court may, in the exercise of its general equity powers, review the decision of the Commission.

WHEREFORE, having fully answered, defendants demand judgment together with the costs of this action. (12

/s/ LEO A. ROVER
Leo A. Rover
United States Attorney

/s/ OLIVER GASCH
Oliver Gasch
Assistant United States Attorney

/s/ FRANK H. STRICKLER
Frank H. Strickler
Assistant United States Attorney

/s/ ROBERT L. TOOMEY
Robert L. Toomey
Assistant United States Attorney

13) UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

[SAME TITLE]

Motion to Dismiss or in the Alternative for Summary Judgment

Come now defendants and move the Court to dismiss the complaint herein upon the ground that the Court lacks jurisdiction of the subject matter of this action. In the alternative, defendants move the Court for summary judgment upon the ground that there are no genuine issues of material fact and they are entitled to judgment as a matter of law. Attached hereto and made a part hereof are the following exhibits:

1. Transcript of hearing before Foreign Claims Settlement Commission, December 22, 1954.

2. Certified copies of proposed and final decisions of Foreign Claims Settlement Commission in case No. Y-647.

3. Letter from attorney for plaintiff to Foreign Claims Settlement Commission, dated December 14, 1954 and letters of said Commission to plaintiff's attorney, dated December 14, 1954 and December 30, 1954.

4. Affidavit of William P. Arnold.

/s/ OLIVER GASCH
Oliver Gasch
Assistant United States Attorney

/s/ EDWARD P. TROXELL
Edward P. Troxell
Assistant United States Attorney

14) /s/ FRANK H. STRICKLER
Frank H. Strickler
Assistant United States Attorney

/s/ ROBERT L. TOOMEY
Robert L. Toomey
Assistant United States Attorney

Exhibit 1

Proposed Decision

FOREIGN CLAIMS SETTLEMENT COMMISSION
OF THE UNITED STATES

Washington, D. C.

DOCKET No. Y-647
DECISION No. 1533

In the Matter of the Claim of

AMERICAN AND EUROPEAN AGENCIES, INC.
c/o Coudert Brothers
488 Madison Avenue
New York, New York

Under the Yugoslav Claims Agreement of 1948 and the International Claims Settlement Act of 1949

Counsel for Claimant:

COUDERT BROTHERS
777—14th Street, N. W.
Washington 5, D. C.

Proposed Decision of the Commission

This is a claim for $1,538,753.52 by the American and European Agencies, Inc., a corporation organized under the laws of the State of New York on January 20, 1945, and is for the taking by the Government of Yugoslavia of a plant for the manufacture of plastic wood slabs located at Villa del Nevoso (Ilinska Bistrica), Yugoslavia, and owned by the Fallersa, S. A., an Italian corporation with its *siege social* in Trieste, in which claimant alleges it owns 12,320 shares of the 20,000 shares issued and outstanding.

The claimant has submitted evidence that all of its outstanding stock has been owned since the first issue on January 25, 1945, by E. Paul Yaselli, Joseph Yaselli and Diana Yaselli, who have been citizens of the United States since October 2, 1888, March 24, 1893, and June 22, 1926, respectively.

132) As evidence of its acquisition of the shares of Fallersa, claimant has filed a copy of a notice published in the Official Legal Gazette of Rome on April 27, 1945, showing that E. Paul Yaselli, claimant's President, was authorized to sign contracts in the claimant corporation's name and that said authorization was registered with the Clerk of the Tribunal in Rome. Claimant has also filed a photocopy of a "Bill of Sale", dated September 27, 1945, and acknowledged before the United States Consul in Rome on the following day. This document recites:

> "The undersigned Federico Carlo Prince Windisch-Graetz acting for himself and on behalf of the following named persons, Amedeo Prince di Windisch-Greatz, Countess Luigia Ceschi a S. Croce, Elisabetta Princess di Windisch-Graetz, Leontina Princess di Windisch-Graetz, Ugo Prince di Windisch-Graetz, Prince Massimiliano Antonio di Windisch Graetz and Baron Leo Ecconomo, through a duly authorized power of attorney executed on September 21st. 1945, before Notary Public Sandrin Bruno fu Antonio, in the city of Trieste, Italy, sells and assigns on behalf of the above named persons and for himself, in consideration of $1.00. (one dollar) and other valuable considerations, their respective shares of stock of the Fallersa company, an Italian stock company, with its head-quarter in the city of Trieste, Italy, to the American and European Agencies, Inc. 12,320, (twelve thousand three hundred and twenty shares) shares of the said Fallersa company.

"In addition, the above named persons including the undersigned sell and assign, in consideration of $1.00. (one dollar) and other valuable considerations, their respective credits that they have against the said Fallersa company, amounting in all to the sum of lires 13,012,000. (Thirteen million and twelve thousand lires) to the said American and European Agencies, Inc. an American corporation, incorporated under the laws of the State of New York and duly authorized to do business in Italy and duly registered with the Italian Chamber of Commerce of Rome, its number being 128747.

/s/ Federico Carlo Prince di Windisch-Graetz
Federico Carlo, Prince di Windisch-Graetz.

"The American and European Agencies, Inc., as above stated, through its President E. Paul Yaselli, in consideration of one dollar ($1.00) and other valuable considerations, purchases the said shares of stock (12,320. shares) of the said Fallersa company and the said credits against the said company, (Fallersa) amounting to lires 13,012,000. (133

/s/ American and European
Agencies Inc. E. Paul Yaselli Pres.
American and European Agencies,
Inc., by E. Paul Yaselli, President"

Claimant has also filed an original letter dated September 28, 1945, addressed to E. Paul Yaselli and signed by "Federico of Windisch-Graetz". The contents of the letter are as follows:

"With this I come to confirm that today you have paid me:

"U. S. A. $20,000 (twenty thousand dollars U. S. A.) on account of the total sum of U. S. A.

$300,000 (three hundred thousand dollars U. S. A.) agreed upon as the purchase price on the part of the American and European Agencies, Inc., of 12,320 (twelve thousand three hundred twenty) shares of the corporation FALLERSA (Plastic panel factory, incorporated of Trieste) belonging to the members of my family.

"In addition, the Fallersa owes us for a credit amounting to Lire 13,012,000 (thirteen million twelve thousand lire) which, computed on the basis of an exchange rate of one dollar being equal to twenty lire amount to U. S. A. $650,600.00 (six hundred fifty thousand six hundred dollars U. S. A.).

"It is understood that the remaining sum of $280,000.00 (two hundred eighty thousand dollars U. S. A.) in addition to the countervalue of the sum representing our credit of Lire 13,012,000.00, computed at the exchange rate of one dollar being equal to twenty lire, amounting to $650,600.00 (six hundred fifty thousand six hundred dollars U. S. A.) shall be paid by you to me or to a person representing my family, six months after the American and European Agencies, Inc. shall have taken possession of the factory.

"I inform you that it will be my duty as agreed upon to have our shares of stock transferred immediately upon the books of the corporation to the name of the American and European Agencies, Inc., and that Dr. Ugo Prince of Windisch-Graetz will resign as President of the corporation so that you, Mr. E. Paul Yaselli, can be elected in his place.

"In faith, in my own name and as attorney for members of my family."

As additional evidence with respect to the purchase of the stock, claimant has filed a certified copy of a

letter dated in Rome on November 14, 1945, from the Italian Ministry of Treasury authorizing the purchase of the 12,220 shares by claimant and the cession of the credit of 13,012,000 lire to claimant. The letter adds: (134

> "It is understood that the corporation can settle the operation in Italian lire and it is further understood owing to this mode of payment and observing the currency laws, the entire block of shares so sold must be deposited in a special account to be opened with a local branch of the Bank of Rome and subject for each operation to the preliminary authorization of this Ministry.
>
> "It is also understood that the entire amount of dividends that may become due on the said shares of stock as well as the possible interest maturing on aforesaid credit, cannot be transferred to a foreign country and can be used in Italy in accordance with the currency laws in force."

It is observed that while it was "understood" by the Ministry that the shares would be deposited with the Bank of Rome, this disposition was never carried out. In an affidavit of E. Paul Yaselli, dated February 9, 1954, he swore that the certificates were "endorsed in blank and deposited with the Banco di Roma at Rome, Italy, as custodian for AMERICAN AND EUROPEAN AGENCIES, INC., the owner, and the sellers, as pledgees". However, in an affidavit of August 20, 1954, he corrected his previous affidavit, and swore that "The delivery of the certificates representing these shares of the Fallersa Corporation for registration of the transfer took place on March 18, 1946, and the completion of the registration occurred on April 1, 1946, whereupon they were delivered into the custody of Alberto Fontana, of Rome, Italy, who was to deposit them with Banco di Roma." However, as appears from the affidavit of Fontana and a letter from Silvio Battistela, Fallersa's

Vice-President, Fontana never deposited the certificates with the Bank of Rome, in accordance with the Ministry's instructions, but retained possession of them "in order to avoid the heavy expense of having them kept in the custody of the Banco di Roma". Fontana did, however, eventually deposit the certificates with the Banca Triestina on December 22, 1953, and permission was subsequently secured for such deposit from the Ministry of Treasury on July 19, 1954.

As evidence of the registration of the shares of Fallersa in claimant's name, claimant has filed a certified copy of an extract from the Stockholders Register of Fallersa, showing the cancellation of old and the issuance of new stock certificates to claimant, one certificate for 4,700 shares remaining as security and guaranty in favor of certain persons, including E. Paul Yaselli. Claimant has also filed evidence that on March 25, 1946, E. Paul Yaselli was elected President of Fallersa.

In order to show that the parties to the transaction were dealing at "arms length", claimant has filed a letter dated August 29, 1945, addressed to Mr. Yaselli. Since claimant strongly relies on this document on showing the *bona fides* of the transaction and the fact that it is both legal and beneficial owner of the stock, we shall quote freely from the letter:

> "My sons Maximilian and Frederic have been telling me by telephone last night that Baron Sachs, who for many years has been assisting me as my attorney in all legal affairs regarding our family estate in Jugoslavia, was kind enough to introduce my sons to you and that all four of you had very interesting talks about my Fallersa stock. They tell me that they believe to have aroused your interest in this factory and ask me to give you some more

authentic details about its present situation, which for a foreigner might be difficult to understand.

"First of all let me tell you that to me the idea brought forth by Baron Sachs, that is the payment in cash of a minor sum of dollars and the major dollar sum after your having taken up work in the factory, would suit me in general. Of course the minor sum of 10 to 15 thousand dollars in cash suggested by you is far too small and we will have some difficulty in agreeing on the major amount as well. But all in all I am convinced we shall be able (136
to find an agreement somehow and I will be pleased to hear some new proposals or perhaps to meet you personally for further talks here in Trieste.

"Let me now give you some details about our situation and point out to you what seems to me to be of essential importance.

"The reason why I wish to sell my majority stock of the factory to some foreigner, like yourself, is practically the following one:

"My family belonging to the Central-European Nobility, is greatly endangered by the new communist influence arising in Jugoslavia. The Jugoslav occupying forces have immediately after the armistice laid hands on all our large forests, castles, houses, factories etc. Fortunately up to now nothing has happened to the Fallersa, as this factory is a separate corporation and our name does not appear in it, but I am not at all sure about the future. You as foreigner will certainly have no difficulty whatever to possess the factory and to stay there as often and as long as you wish, whereas every single member of my family risk to be arrested and joint my youngest brother who was already kidnapped here on May 13th and seems to be in a Lubiana prison since then.

"My boys have been telling you something about the extra-ordinarily favourable prospects for producing re-integrated wood panels with all the vast magnificent forests just in fron of the factory doorsteps. I would not hesitate to say, that the brand-new factory should be able to rent some 50%. Under normal circumstances the price of the factory should not be less than 1½ million dollars. My stock being something more than 60% (about 38% belong to some other Italian citizens) is worth about 1 million dollars. You can well imagine that only reluctantly I am thinking of selling my stock of the Fallersa, but who knows when and whether I will be able to have my forests back again. If I should get something about half the value of my stock is worth, I will at least have something for my very large family to start a new life with. The minor amount in cash would serve me for an immediate emergency case. In fact not even your President may know exactly what is going to happen to our blessed town and its surroundings, and yet I hope your Government may urge the Jugoslavs to go back to their old frontier-line.

"There is one thing more, I wish to tell you: We must not forget that we Italians by fascist law are forbidden to own foreign currency, therefore we must take care not to have anything written down regarding the dollar cash. It will have to be a gentlemen-agreement on a simple given word until this beastly fascist law will be abolished, let us hope soon.

"In view of the coming Peace Treaty, there is not much time to be lost. Fortunately the telephone-line to Rome is allright again, so you may ring me up any time. My number is 58-09.

"Not knowing your address yet, I am sending this letter to my friend Baron Sachs. Let me thank

you for the kind words you had for my boys as well as for the interest you take in our Country. Hoping to meet you soon here, I am

yours very sincerely

/s/ DOTT. UGO PRINCIPE DI WINDISCH-GRAETZ"

In addition, claimant has filed the affidavit, dated November 5, 1954, of Federico Windisch-Graetz, who swears:

"Prince Federico Windisch-Graetz, being duly sworn deposes and says; that I reside in Trieste, Italy, 281 Viale Miramare, that as representative of several owners of stock of the Fallersa corporation, duly authorized by each stockholder, agreed with the American and European Agencies, Inc., a New York corporation, in the month of September 1945 after negotiations had been carried on for several months with its President E. Paul Yaselli, to sell to the American and European Agencies, Inc., 12,320 shares of the Fallersa stock, that our group owned, for the sum of Dollars 300.000.— and the credit of lires 13,012,000.—, which calculating the lire at the rate of 20.— lires to the dollar, would amount to Dollars 650,000.—was to be paid in addition to the Dollars 300,000.— for the value of the 12,320 shares of stock, in other words the whole transaction was for Dollars 950,600.—

"That the agreement was made in dollars, because of the instability of the Italian lire at the time.

"I executed an agreement before the American Consul in Rome, Italy, on the 28th. day of September 1945 and delivered it to Mr. Yaselli, at his home on the same day, Via Lovanio 6, Rome, Italy, after Mr. Yaselli handed me Dollars 20,000.— in U. S. Currency, I handed him the signed contract of sale

and purchase. The reason for accepting from Mr. Yaselli the U. S. Currency from him personally, instead through a bank, was because at the time an Italian national was not allowed to possess foreign Currency of any kind and Italian banks could not pay to an Italian National Currency in any other Currency than Italian lire."

And in an affidavit dated November 5, 1945, Massimiliano Windisch-Graetz swears:

38) "Prince Massimiliano Windisch-Graetz being duly sworn deposes and says; that I reside at Viale Miramare Number 281 city of Trieste, Italy; that on or about the month of July, 1945, I was introduced to E. Paul Yaselli, Esq., as President of the American European Agencies, Inc., by Baron Niels Sachs di Gric, an old friend of the family, residing at Trinita dei Monati, 17, Rome, Italy. Baron Sachs introduced Mr. Yaselli to me at the Grand Hotel, Rome, for the purpose of discussing the purchase of our interest in the Fallersa corporation.

"This introduction was followed with several other meetings, which culminated in Mr. Yaselli accompanying me to Trieste, where he could investigate the corporation's affairs, talk to my father, my uncle Baron Economo, a stockholder in the Fallersa and other stockholders of the corporation, examine the books of the corporation and talk to Directors and officers of the corporation; this visit was made some time in late summer 1945.

"After this visit Mr. Yaselli was satisfied with the representations I and Baron Sachs made to him and agreed to purchase all of our stock, amounting to 12,320 Shares, for the sum of Dollars 300,000.— and the full value of the credit of lire 13,012,000.—

amounting in Dollars to 650,600.— at the rate of 20.— lires to the dollar. This was an agreement which was to be perfected in Rome, as soon as we could get the authority of all the stockholders to agree to the tentative agreement; it was further agreed upon, that my father was resign as Director and President of the corporation and Mr. Yaselli was to be elected in his place.

"All this matter of getting all the stockholder's consent to the said agreement took some time and finally at the end of September, 1945, my brother Prince Federico had secured a power of attorney from all other stockholders to act for them in the transaction, and both went to Rome, to consumate the tentative agreement as above stated. We went with Mr. Yaselli on the 28th. day of September before the U. S. Consul in Rome, Italy and signed the agreement of sale and purchase before the U. S. Consul Byron B. Snyder under oath. My brother Prince Federico having the power of attorney from the stockholders signed the agreement and Mr. Yaselli signed the agreement on behalf of the American and European Agencies, Inc. After this, myself, my brother Federico and Mr. Yaselli went to Mr. Yaselli's home at 6 Via Lovanio, Rome, Italy and there in my presence Mr. Yaselli, handed by brother Federico Dollars 20,000.— in U. S. currency, which represented a part payment for 12,320 shares of stock certificates and the credit of lires 13,012,000.— and in turn my brother Federico in my presence handed Mr. Yaselli the said agreement signed before the U. S. Consul. It was understood that the stock certificates would be turned into the corporation for cancellation and new ones issued to the American and European Agencies, Inc. in due course, which was done according to the agreement.

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> "The reason why the transaction was entered into in dollars, was because of the uncertainty of the Italian lire and the further reason why the money was not paid through a bank, was because a bank could not pay an Italian national except in Italian lire, an Italian nationals was not allowed to possess foreign currency."

Several unusual features of the transaction by which claimant acquired the stock are immediately apparent. In the first place, at the time of the sale the Fallersa plant was located in territory controlled and occupied by Yugoslavia and the plant itself was in Yugoslav hands. Yugoslav intentions toward that territory were well known and communist influence in Yugoslav economic and political affairs had already become manifest. In the face of impending seizure of the territory and the imminent expropriation or confiscation of the property of Italian persons and corporations, the claimant purchased the majority of the stock in Fallersa and a credit in the amount of 13,012,000 lire. What is more surprising, however, is that claimant agreed to pay the entire purchase price in dollars, $300,000 for the stock and $650,600 for the credit. Another singular feature of this transaction is that the lire credit was converted to dollars at the rate of 20 lire to 1 dollar. Mr. Yaselli has explained this conversion rate as being the "legal rate" at the time. But the legal rate in 1945 was 100 lire to 1 dollar and went to 225 lire to 1 dollar in 1946, (See *Statistical Yearbook of the United Nations*, 1948, p. 374). The result, therefore, was that in exchange for becoming a creditor of Fallersa in the amount of 13,012,000 lire, claimant became a debtor to the Windisch-Graetz group in the
140). amount of $650,600, when this lire credit at the legal rate was equivalent to only $130,120 and doubtless much less at a "free" rate. The questionable nature of the whole transaction as a *bona fide* and prudent business venture is com-

pounded when the evidence shows that the transfer to a foreign country of dividends on the stock and interest on the credit was prohibited.

We note also that only $20,000 out of a total purchase price of $950,600 was paid by claimant, and that the remainder "shall be paid . . . six months after the American and European Agencies, Inc. shall have taken possession of the factory". There is evidently no time limit within which possession must be had, and this commission is not consonant wth an "arm's length" transaction of such proportions. In addition, we do not find that the record shows that claimant ever got possession of the plant. On the contrary, in a letter of June 6, 1946, from Yaselli to A. F. H. Q., Caserta, he stated "We were allowed to visit the factory from A to Z". A permissive visit accorded by the Yugoslavs on the premises of the plant can hardly be construed as possession.

As to the $20,000 payment, Yaselli has stated that he carried it in the form of currency from Germany to Italy in a brief case in early 1945, passing across the border and through the German and Allied lines without being searched. Even if we give credit to an apparently remarkable immunity to the ordinary interferences of nations and armies in such matters, the possession and payment of dollars was itself a violation of the domestic law of Italy and that of the Allied Military Government at such time. Aside from these considerations, the claimant itself used none of its own money in the transaction, as the money belonged to Yaselli, acting on behalf of a family corporation formed in New York a brief nine months before while he was in Italy.

Under these facts, the claimant cor oration asks this Commission to award it the amount of $1,538,753.52 for the taking of Fallersa, which the Government of Yugoslavia concedes it took pursuant to the Nationalization Law

of December 5, 1946 (Official Gazette No. 98 of December 6, 1946) "which with respect to the provisions of the Peace Treaty with Italy, entered into force on the territory of Ilinska Bistrica on September 15, 1947."

The Yugoslav Claims Agreement of 1948, by virtue of which this claim was filed, was the result of diplomatic negotiations between the Governments of the United States and Yugoslavia. It is proper, therefore, to inquire into certain principles pertaining to the diplomatic espousal of claims by this Government.

In the exercise of its discretion as to whether a claim will be espoused, the Department of State has been guided by principles which are never circumscribed by a mere inquiry as to whether ownership of the property which is the subject matter of the claim is in United States nationals. The maxim *ex dolo malo non oritur actio* is especially applicable to limitations on diplomatic protection (See Borchard, *Diplomatic Protection of Citizens Abroad,* pp. 714 et seq.). Other considerations inhibiting protection are speculation and exaggeration in claims and collusion, misrepresentation or illegal transaction (Hackworth, *Digest of International Law,* Vol. V, p. 710; Moore, *International Law Digest,* Vol. VI). In the case of corporations, the Department has required that there be a "substantial" American interest in such corporation to authorize diplomatic espousal of a claim. See Borchard, *supra,* pp. 621-2. This
142) principle has been written into Article 2(B) of the Agreement requiring that 20% or more of the outstanding securities of an American juridicial person be owned by United States nationals. The Commission has previously held that this ownership must be beneficial as well as legal. Decision No. 54, *In the Matter of the Claim of Westhold Corporation,* Docket No. Y-1235.

Arbitral tribunals, likewise, have not been satisfied with ostensible American ownership, but have even inquired

into the disposition of the proceeds of an award. Thus, Sir Edward Thornton, Umpire of the Mexican Claims Commission, declared:

> "In the case of Herman F. Wulff v. Mexico, No. 232, with regard to which the umpire is asked to amend his award of June 18, 1875, by making it absolute in favor of the administrator instead of conditional upon proof that the recipient shall be a citizen of the United States, the umpire cannot acquiesce in the arguments put forward by the counsel for the claimant, whoever that claimant may be. He is of the opinion that not only must it be proved that the person to whom the injury was done was a citizen of the United States, but also that the direct recipients of the award are citizens of the United States, whether these beneficiaries be heirs or, in failure of them, creditors. The heirs are certainly benefited by being able to pay the debts of their deceased relative, even though the whole of the award may be swallowed up by the creditors. If there be no heirs and only creditors, the umpire is of the opinion that even those creditors who are the immediate recipients of the award must prove that they are citizens of the United States. The umpire thinks that the Commission can make no award except to corporations, companies, or private individuals who are citizens either of the United States or of the Mexican Republic, respectively." (*Moore's Arbitrations,* Note #6 at p. 353)

Recently, the American Mexican Claims Commission adjudicating claims under the Settlement of Mexican Claims Act of 1942 (Public Law 814, 77th Congress, 2d Session, 56 Stat. 1058) passed on a question similar to that with which we are confronted here in Decision No. 37-B (*Report to the Secretary of State,* Department of State Publi-

cation 2859, Arbitration Series 9, p. 191). The decision
13) is of particular significance, because that Commission, like this Commission, adjudicated claims in which compensation was to be paid from a limited fund provided by an *en bloc* settlement.

In that case one element of the claim was for wrongful deprivation of property in 1914. Claimant corporation was organized in New York on May 28, 1914, and on June 1, 1914, acquired the land, which was the subject matter of the claim, by deed from two Mexican citizens, who had requested the incorporation of the claimant. Stock was issued to persons claiming United States citizenship, and the fact that only a small amount was paid on account therefor, the balance being owed to Mexican citizens, was a vital factor in testing the *bona fides* of the transaction. In holding that the transaction lacked *bona fides* and that the claim of error had no merit, the Commission quoted Commissioner Lawson

> "The original definite consideration involved in the acquisition of the shares, which admittedly in large part was never paid, is now attempted to be substituted by something of a very indefinite and uncertain nature. As the record stands at present, there is no satisfactory basis for concluding that the consideration involved in the acquisition by Lorenza R. de Braniff of stock of the Monte Blanco Real Estate Corporation of a par value of $499,000 was in excess of $46,500, if indeed that evidence can be regarded as satisfactorily establishing the transfer of consideration even to that extent. The question of the existence of a bona fide interest in the Monte Blanco Real Estate Corporation, therefore, on the part of Lorenza R. de Braniff, cannot at best, be regarded as free from serious doubt.
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> • • •

> "The conclusion seems inescapable in the instant claim that an effort is made, through the instrumentality of the Monte Blanco Real Estate Corporation, which, if successful, would, in substance amount to the espousal by the Government of the Government of the United States of the claim on behalf of other than American interest." (idem. p. 193)

The Commission also found that the position taken by (14
claimant in the petition for review instead of showing error fortified the view that: "The only thing that can be suggested, is that the transfer of Hacienda to an American Company, the Monte Blanco Company, *was concocted to protect the Hacienda from seizure by the Mexican Government—a fact stated openly in the record.*" (idem: p. 195)

This Commission is charged with adjudicating claims which are to be paid from a limited fund which in all likelihood will prove inadequate to meet the full amount of the principal of the awards. The weight of its responsibility toward all claimants is, accordingly, heavier than that ordinarily borne by arbitral tribunals, where the granting of an award in a particular claim does not in any way affect other claimants. Under these circumstances, considerations *ex aequo et bono* command more attention than is usually the case. Most of the claimants before the Commission were the owners of small farms, and the property of many was heavily damaged during the war for which we can allow no compensation here. The great majority of the claims over which we have jurisdiction represent the last evidence the owners possess of what was once a means of livelihood or a home or the final legacy of a deceased relative. From equitable considerations, therefore, the instant claim has no standing whatsoever.

But this claim need not be decided on equitable grounds. The transaction on which this claim is grounded was motivated by a desire to put the property under American protection in the face of its imminent seizure by the Government of Yugoslavia. The prestige of the United States will not lend itself to becoming a party to international trafficking for the favor of its protection. In August 1946, the Department of State specifically approved the position of the Embassy in Rome in withholding action on Yaselli's request for American protection and stated that the United States Government would not in the circumstances be justified in extending such protection. The transaction was speculative and involved an illegal payment and unless an award in this claim would exceed $950,600, all the proceeds thereof, except for the $20,000 payment, would be subject to the demand of foreign citizens. Finally, as we have previously pointed out, certain aspects of the transaction raise serious doubts as to the *bona fides* of the transaction and of this claim.

For the foregoing reasons the claim is denied.

Dated at Washington, D. C.
NOV 26 1954

Exhibit 2

COUDERT BROTHERS
Attorneys and Counsellors at Law
488 Madison Avenue
New York 22

December 14, 1954

Foreign Claims Settlement Commission
of the United States
Washington 25, D. C.

Re: Claims of American and
European Agencies, Inc.,
Docket Nos. Y-647 and
Y-1578

Dear Sirs:

The undersigned, attorneys for the claimant, acknowledge service upon them, on November 30, 1954, of the Proposed Decisions of the Commission in the above-captioned matters, Decision No. 1533, dated November 26, 1954, in Docket No. Y-647, and Decision No. 1539, dated November 29, 1954, in Docket No. Y-1578.

A hearing is requested on each said claim for the taking of evidence and for the hearing of oral argument.

Each Proposed Decision denies the subject claim in its entirety. The claimant's objections to each such denial and the assigned errors relied upon are as follows:

I. (A) The Proposed Decision is illegal and unauthorized, and the Commission exceeded and abused its authority and discretion in rendering the same, in that the Commission failed to comply with the express provisions of the Act establishing the Commission, which prescribed the

decisional process to be applied by the Commission, as follows:

> "In the decision of claims under this Act, the Commission shall apply the following in the following order: (1) The provisions of the applicable Claims Agreement as provided in this sub-section; and (2) the applicable principles of international law, justice and equity."

The Commission violated the statutory command by denying on grounds of arbitrarily established policy, claims which are squarely within the express provisions of the Claims Agreement and the Act.

(B) The Proposed Decision is, in any event, erroneous in that the precedents of international law and the doctrines of equity therein referred to are irrelevant to the instant cases and incorrectly interpreted and applied.

II. The Proposed Decision is contrary to the evidence and to the weight of the evidence; the Proposed Decision is predicated upon unsound reasoning based on suppositions, immaterial premises, a misconstruction and disregard of the established facts and evidence, and erroneous interpretation and application of alleged foreign laws (none of which is cited).

The claimant's brief in support of the said objections and assignments of error is filed herewith.

Three copies of the within letter are filed for each claim file.

Respectfully yours,

COUDERT BROTHERS
Attorneys for Claimant

Exhibit 3

FOREIGN CLAIMS SETTLEMENT COMMISSION (1
OF THE UNITED STATES
Washington 25, D. C.

December 14, 1954

REGISTERED MAIL
RETURN RECEIPT REQUESTED

Percy A. Shay, Esquire
Coudert Brothers
777 Fourteenth Street, N.W.
Washington, D. C.

Re: American and European Agencies, Inc.
Docket Nos. Y-647 and Y-1578

Dear Mr. Shay:

In accordance with my phone conversation with your office as of this date, the hearing which was requested on the above claims will be scheduled at Room 162, Tariff Building, 7th and E Streets, N.W., Washington, D. C., on December 22, 1954 at 2:00 P.M.

In the event that a hearing is no longer desired please notify the Commission immediately.

Very truly yours,

Richard W. Berg
Executive Assistant

Exhibit 4

Transcript of Hearing

FOREIGN CLAIMS SETTLEMENT COMMISSION

DOCKET No. Y-647

In the Matter of

AMERICAN AND EUROPEAN AGENCIES, INC.
488 Madison Avenue
New York 22, New York

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(1)

The above-entitled matter came on for hearing pursuant to notice at 2:00 o'clock p. m., Wednesday, December 22, 1954.

BEFORE:

HARRY N. STEIN, Hearing Officer

APPEARANCES:

JAMES E. HUGHES, ESQ., and GEORGE F. MASON, JR., ESQ., Coudert Brothers, 488 Madison Avenue, New York, New York, on behalf of the claimant.

ROBERT VOTE, ESQ., Attorney for the Commission.

WITNESS:

E. PAUL YASELLI, President of Claimant.

• • •

PROCEEDINGS (3:14)

Mr. Stein: This proceeding is in the matter of the claim of American and European Agencies, Inc. of 488 Madison Avenue, New York 22, New York, Commission's Docket Number Y-647.

Exhibit 4

Transcript of Hearing

My name is Harry N. Stein, I am a member of the Commission staff. Pursuant to authority vested in the Commission, I have been designated to preside at this hearing.

The record will show that the claimant is present and represented by Mr. E. Paul Yaselli, the president of the corporation, and by his counsels, Messrs. James E. Hughes and George F. Mason, Jr.

The record will also show that the Commission is represented by its counsel, Mr. Robert Vote.

This hearing is on the objections of the claimant to the proposed decision issued by the Commission on November 26, 1954 which denied the claim for the reasons indicated therein in its entirety. Thereafter, pursuant to the applicable Commission regulations, objections to the proposed decision were duly filed, together with a supporting brief and a request for a hearing. Pursuant to that request and by letter thereafter, sent by the Commission on December 14, 1954 to Percy A. Shay, Esquire, member of the firm of Coudert Brothers, counsel of record for the claimant, hearing on the claimant's objection was scheduled to be held at this office on December 22, 1954 at 2:00 p. m.

It is now 2:00 p. m. The hearing will come to order.

You are aware, gentlemen, that this hearing is not intended to be in the nature of a trial de novo and I would suggest, if I may say so, from your point of view as well, that your testimony be directed solely to those phases of the claim which as indicated in the proposed decision seem to be in doubt.

The same observation I think I might make with respect to any legal argument you may make. I have no intention of restricting your presentation in any way, but your brief is comprehensive, and the entire record, including your brief, as supplemented by the proceedings today, will be the record upon which the whole Commission will make the decision.

I would suggest again, if I may be presumptuous enough to say so, that from your own interest it may be well to focus upon the outstanding issues.

Preliminarily also I have this observation to make: I haven't by any means thoroughly examined this file. I have examined the file and I haven't digested it, which may or may not be a good thing. I think rather it may be a good thing from your point of view.

In any case, my impression is that on the evaluation phase of this matter concerning which very little thought evidently has been given, I get the impression from reading such of the the record as relates to evaluation that if not entirely academic the result of this hearing may not amount to nearly as much as you think because I have the impression that both of the properties would be evaluated for not much more than nominal figures.

Do you have any comments on that, Mr. Vote?

Mr. Vote: Well, Mr. Lund of the Securities and Exchange Commission has furnished a memorandum on both properties, and in his opinion he stated that the stock wouldn't be worth more than nominal value because of the tremendous liabilities which are present in both companies.

Mr. Hughes: Now which case are you speaking about?

Mr. Vote: That is both. He has filed a memorandum with respect to both companies.

Mr. Hughes: Is it time for me to speak yet, or how do you wish it?

Mr. Stein: I was going to add only this, that I didn't make that observation for the purpose of discouraging you from proceeding in this matter but, rather, and solely for the purpose of indicating to you to the extent that you could supplement the record by evidence of value it might be helpful if the Commission was disposed to reverse its basic finding of denial.

I just wanted to be sure that it was understood that in the course of the discussion and presentation relating to

the very interesting problem of qualification that you should not overlook the fact that the evidence—at least the evidence that we have of value—indicates a much lesser value than apparently you people are thinking of; so that I make that suggestion.

Mr. Hughes: Mr. Hearing Examiner, may I now answer?

Mr. Stein: Yes.

Mr. Hughes: I would only like to say this: We were faced with a very similar statement by the Hearing Examiner in another case about ten days ago, and at that time we pointed out, as I would like to point out now, that we had received no information from the Commission or its staff prior to the date of this hearing or up to this very minute as to what valuation the Commission had arrived at. Consequently, we are completely powerless to meet any view that the Commission may have. We are completely unprepared to do so.

If the Commission wishes to tell us what their valuation is, how it relates to the valuation that we submitted, what premises it was based upon, and so forth, then we will be very glad, with a reasonable time to do it, to assemble rebutting evidence, and what not.

There was in this Fallersa case a valuable factory. It was in full operating condition. It was producing slab wood, and we find it an extremely surprising thing to hear from the Commission today for the first time that the valuation is considered to be nominal.

Now I would be very glad, as I say, if we are given the proper information about the Commission's position, to try to meet it, but I don't think we can meet it this afternoon.

Mr. Yaselli, for instance, while he is the president of the claimant, is not a trained appraiser of either plants or real estate, and if it is a question of appraising the property, I think we must be given a reasonable opportunity to meet any views the Commission may have.

Mr. Vote: May I speak, Mr. Stein?

Mr. Stein: Sure.

Mr. Vote: There has been no finding whatsoever with respect to either of these claims by the Commission as to value. There has been a memorandum by an expert, hired by the Commission, as to his views.

Now you have used the physical appraisal of the companies and divided the number of shares outstanding into that figure to arrive at stock.

Now the Commission has consistently evaluated stock where it could on the basis of net worth. The decisions in which the Commision has done that have been available to Coudert Brothers ever since this Commission was established, and for you to say that this is the first time you knew how the Commission has evaluated these properties is not——

Mr. Hughes: I don't think I made any such statement.

Mr. Stein: Mr. Vote hasn't finished.

Mr. Hughes: I am sorry.

Mr. Vote: Maybe I misunderstood you then, sir.

Mr. Hughes: May I repeat?

Mr. Stein: Well, I don't see any point in repeating it.

Mr. Hughes: May I then try to answer what Mr. Vote apparently misunderstands?

I am not quarreling with any position as to the law which the Commission may see fit to take. We may or may not agree with it. That is another point. But if there is a question of appraisal of assets from which point you must certainly start in any case of this kind, we are not prepared to meet that this afternoon because we have not heard from you.

Mr. Stein: Well, let me put it this way: Again I don't want to sound argumentative about this, but as you are aware, the burden of proof in all issues in claims of this kind is on the claimant. That is a well-established rule that the Commission has followed throughout.

Mr. Hughes: Correct.

Mr. Stein: One of the major issues in this claim, as all claims, is that of evaluation. You have submitted, apparently, some data which you believe is evidence of value. On the other hand, the Commission's investigators have submitted other data. All of that data, yours as well as the Commission's data, will be considered in reaching a final determination.

Now what is it precisely that you think you should be given an opportunity to meet?

Mr. Hughes: The answer is very clear. You have partially answered Mr. Vote. You have said that the Commission does have information about the appraisal of the properties, if I understand it. Now the Commission has available to it the evidence we have submitted, but we do not have available to us the Commission's position.

Mr. Stein: That is true.

Mr. Hughes: That is the only point I was trying to make, Mr. Hearing Examiner.

Mr. Stein: But it is not customary, certainly, in connection with a decision which denies a claim, to indicate what the value would have been if there hadn't deen a denial.

Mr. Hughes: That is very true, Mr. Hearing Examiner, but in the case where there is a preliminary denial, if that denial is then withdrawn and there is a decision for the first time on evaluation, only common fairness would dictate that the claimant would have a chance to examine into the question of evaluation. That is the point we would like to make.

If the claim were partially allowed in the first instance, the claimant would have a full hearing on the question of evaluation, and by this procedure of first denying in toto and then leaving the matter of evaluation to come up for

the first time after the reversal of the proposed decision, the claimant is completely powerless to meet the issue.

Mr. Vote: Mr. Hughes, when did you think the matter of evaluation would come up at a hearing?

Mr. Hughes: If we had received a partial allowance, we would have had a hearing on the question of evaluation if we had wanted it.

Mr. Vote: You did not anticipate that this would be a hearing on value too?

Mr. Hughes: Mr. Vote, I repeat——

Mr. Stein: May I ask, when did you think would have been the proper time to introduce whatever additional evidence you might be in a position to introduce?

Mr. Hughes: The distinction the Hearing Examiner has made is a correct one. We have submitted our evidence. We did not anticipate that it would be necessary to submit all evidence unless that were controverted in open hearing.

Mr. Mason: Furthermore, we have no way of knowing how the Commission has computed the net value of the stock which, of course, is an extremely complex and complicated computation upon which accountants differ, which is influenced by a great many factors.

We have no way of knowing at all on what basis the net worth is computed or whether or not the computation which is made is made in accordance with the specific provisions in the Yugoslav claims agreement and in light of those provisions. We have no issue before us to meet.

Mr. Stein: What provisions are there in the claims agreement which relate to the method of computation?

Mr. Hughes: The answer to that is that there are very complicated provisions in the claims agreement about the treatment of debt.

Mr. Stein: I see. That is what you are thinking about.

Mr. Hughes: And it is our understanding from something that Mr. Vote intimated as to the question of net

worth and the evaluation of the capital stock that what he is inferring is that the question of debt of this company is the important one.

Now I may have misinterpreted your statement, Mr. Vote.

Mr. Stein: Let me put it this way, and I think this would be a satisfactory disposition of this phase of the matter: Do I understand you to say that you are today not in a position to introduce any further evidence of evaluation?

Mr. Hughes: That is correct.

Mr. Stein: You are in position solely to proceed on the underlying question of ownership or the validity of the claim?

Mr. Hughes: The questions raised by the proposed decision.

Mr. Vote: Mr. Hughes, was it your position or your feeling that you were going to have another hearing on value after this hearing?

Mr. Hughes: Mr. Vote, I have no feeling one way or another. I would assume in common fairness we would have if the computations were inadequate.

Mr. Stein: If today the Commission would indicate to you that these properties would be valued at X dollars, you would have nothing by way of evidence to controvert that?

Mr. Hughes: We do not have it available today, sir.

Mr. Stein: That is what my question is.

Mr. Hughes: I do not wish to intimate for a minute that we might not be able to submit such evidence if we knew what the issues were.

Mr. Stein: Then do I understand that your request now is that if as a result of these proceedings today which are going to be limited to the question of ownership the Commission concludes that its proposed decision should be reversed on the ownership question, is it your request

that before a final decision is made as to evaluation that you be given an opportunity of some kind to be heard on that issue? Is that your request?

Mr. Hughes: That is exactly our request, and I would say that we would be very happy to meet any reasonable conditions which the Hearing Examiner or the Commission might want to fix on that.

Mr. Stein: You will recognize that those conditions include a recognition of the fact that these proceedings must be concluded by the end of this year?

Mr. Hughes: Mr. Hearing Examiner, I am perhaps even more conscious of that than you are because we have been subjected, as you have, to tremendous pressure to prepare these cases. This is not the only one we are handling. They have all been brought to hearing as far as our firm is concerned within the space of one month, despite the fact that they were filed way back in 1951. We were given no intimation of what these issues were until less than two months ago, and I am not at all protesting. I understand your problem, and I am extremely sympathetic with it, but I do not feel that it should be the reason for barring a claimant from a reasonable opportunity to be heard on the question of evaluation.

Mr. Stein: I have not indicated any disposition to make any such ruling.

Mr. Hughes: Thank you, sir.

Mr. Stein: I hope you have gathered from what I have said that I am not so disposed, even if it were my responsibility to make that decision, which it is not.

Mr. Hughes: I understand.

Mr. Stein: All I wanted to get on to the record was your request, as I stated before, that if upon consideration of the proceedings today the Commission decides to reverse itself and an award will be made, that you request the Commission for an opportunity of some kind to consider with it any figure it may reach as to valuation.

Mr. Hughes: Unless, of course, they would accept the amount asked in the claims, obviously.

Mr. Stein: That is right.

Mr. Hughes: Yes.

Mr. Stein: Very well, your request is in the record, and when the matter will be considered that also will be considered.

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DIRECT EXAMINATION (69-70)

The Witness: I talked to the father, and he told me that he would be glad to sell the stock, that he wanted to sell it. Then we came to—talked about the price. He said that he wanted to sell the whole thing, the stocks and a credit that he had. He said that he had a credit due him of some 13 million liras.

Mr. Stein: From the same corporation?

The Witness: Yes. That their credit, the money was given to the corporation to increase the capitalization and he was to get stock for it, but due to the war conditions they couldn't get it, machinery wasn't in operation to increase capitalization, and so they couldn't increase it, and then he held it as a credit.

Well, I told him that I couldn't accept that credit in exchange for stock, that I would accept the stock that he had, the 12,300 shares of stock, and pay him a price for that, and then to leave the credit as a credit.

Mr. Stein: You mean as an obligation?

The Witness: As an obligation, yes.

So after, I told him then that before I would decide positively what to do I wanted to talk to the other directors, I wanted to examine the books of the corporation, I wanted to see the bills for the machinery that had been purchased, and all that sort of thing, and so the next day I went to the office of

the corporation in Trieste. I talked to the treasurer. I talked to the vice president. I examined the books. I saw the bills for the machinery that had been paid. I found that everything was paid. There was no debt on the factory at all; it was free and clear.

* * * (71-74)

The Witness: So that after I made that examination, I told him that I would buy the stock at one price and the credit would have to remain as a credit; if he wanted to accept that, all right, if not, but that I couldn't give him a substantial down payment, that the best I could do was to give him 15,000 dollars as a down payment for the stock.

Mr. Stein: What did your then examination of the corporation's records indicate to you to be the net worth of the corporation, taking into account this credit as a liability?

The Witness: I looked at the price of the land that was paid for the land, the cost of erecting the building, the prices of the costs of the machinery that was put into the factory and the whole outfit, which showed that there was a million and a half dollars actually put into the factory.

Mr. Stein: My question was, you said before that you examined the books and records of the corporation?

The Witness: Yes.

Mr. Stein: I take it that you are somewhat familiar with balance sheets?

The Witness: Yes.

Mr. Stein: What did your examination of the balance sheets at that time indicate the net worth of the corporation to be?

The Witness. Well, the actual investment——

Mr. Stein: In figures.

Exhibit 4

Transcript of Hearing

The Witness: They hadn't been doing any business. A million and a half dollars.

Mr. Stein: Are you talking now——

The Witness: The value of the lands.

Mr. Stein: I am not talking about what you evaluate the assets.

The Witness: No, I am talking about what I found from the records.

Mr. Mason: Perhaps I can clear this up if you will let me. I know the facts, and maybe my questions can clear it up.

Mr. Stein: Surely.

By Mr. Mason:

Q. Had the corporation actually been engaged in operations up to that time, A. No.

Q. When had the factory been constructed? A. The factory was constructed between 1941 and 1943.

Q. And what had happened to the factory in or about April of 1945? A. Well, there had been some damage created by a bomb.

Q. Were they repairing that damage at that time? A. At the time—that was later on.

Q. Now were there any substantial debts outstanding against the corporation other than obligations due to the stockholders of the corporation? A. No, no debts.

Q. And had the moneys that had been advanced by the stockholders of the corporation been advanced with the intention that this money ultimately become capital of the corporation? A. Yes.

Mr. Stein: Wait. I think we are stretching it——

Mr. Hughes: It is shown on the balance sheet.

Exhibit 4

Transcript of Hearing

Mr. Mason: All of this is in the record. I am trying to——

Mr. Hughes: The balance sheets are in the record.

Mr. Mason: The balance sheets are there. The bulk of the debt, in fact even the situation today is the same—the bulk of the debt is a 20-million lira advance which had been made by the stockholders with a view to increasing the capital of the corporation. Those moneys had been advanced to pay for the erection of the factory and with the result that all you had was the initial advance by the organizers of the corporation. There had been no business.

Mr. Stein: That is not an abnormal procedure.

Mr. Hughes: No.

Mr. Mason: No; in fact, I think it is quite customary in a new venture enterprise.

• • •

By Mr. Mason: (78-81)

Q. Mr. Yaselli, going back now to the question of negotiations with Prince Hugo Windisch-Gratz, what was the ultimate outcome of the discussion as to whether the new stock would be issued for the credit of the Windisch-Gratz family and then sold to you or the credit retained or the credit transferred to you? How did that finally come out? A. We finally agreed, I increased the $15,000 to $20,000 as an advance payment, and that I would pay $300,000 for the stock and then take over, assume the responsibility for the 13 million lira credit.

Q. Now were all these negotiations conducted in terms of U. S. dollars? A. Yes.

Q. Why was that? A. Well, because it was uncertain what was going to happen to the lira.

Exhibit 4

Transcript of Hearing

Q. Well, did you request that? A. Beg your pardon?

Q. Did you request it? A. No, I didn't request it. They insisted upon that because they felt that after the experience of the German mark in 1922-23 before, they thought the lira was going to go the same way.

Q. Now the debt of 13 million lira, directing your attention to that debt, the papers which had been submitted to the Commission which were executed at that time indicate that you agreed to pay them a counted value of the 13 million lira credit in U. S. dollars computed on the basis of 20 lira to the dollar. Why was the 20 lira to the dollar basis used? A. It was based on 20 liras to the dollar because when the Prince Windisch-Gratz advanced the money to the corporation for the putting up of this factory, the lira had that value, 20 liras to the dollar.

Q. Well, did you feel that the factory at that time, the production plant and the interest in it represented by the stock and debt would give you a fair price? A. Well I tried to get him to accept the present value of the lira at the time, which I think was around a hundred liras to the dollars, but he turned that down; and so I figured that the whole thing would cost me about $900,000 and the factory was actually worth one million and a half dollars, and it was a good business, a new business, would have had the monopoly of this particular board, plastic board, and I thought it was a good buy because I was getting it cheaper than what it cost to build.

Q. Now what then occurred after you had examined the books? Did you close the deal in Trieste then? A. No. I agreed to—we agreed on the terms. That is, I was to give them $20,000 as a down payment, and he was to—and the corporation was to assume the credit of 13 million lira at 20 liras to the dollar, and his son was to come to Rome after he would have talked to all the rest of the stockholders about turning over their stock.

Exhibit 4

Transcript of Hearing

Q. Did you meet his son in Rome? A. Yes.

Q. When was that? A. His son came to Rome on September 27, 1945 and told me that he had the powers of attorney from all the stockholders to negotiate and close the deal. So we drew up the agreement.

Q. Who drew up the agreement? A. I drew up the agreement.

Q. Now when you say "the agreement," what was the title of the agreement? A. Bill of sale.

Q. And that is the document that has been offered in evidence? A. That is right.

Q. And where did you draw that up? A. I drew that up in my office in Rome.

Q. And was that agreement signed by you and by anyone else? A. Yes. The following day we went before the American Consul and signed the agreement before the American Consul. I signed for the corporation and he signed for all the stockholders.

Q. Who proposed that you execute the agreement before the American Consul? A. I did.

Q. Why did you want it executed before the American consulate? A. Because it is cheaper. It costs $2.00 to have a document notarized by the American Consul, and it costs you about $5.00 to go to the Italian notary.

Mr. Stein: May I ask at this point, these contracts are entered into by, on the one hand, the Windisch-Gratz group and, on the other hand, the corporation?

The Witness: Yes, American and European Agencies, Inc., acting as president for the corporation.

• • • (110)

Mr. Stein: Back on the record.

Do I understand that you have completed your testimony in this case, Mr. Hughes?

Exhibit 4

Transcript of Hearing

Mr. Hughes: Subject to the question of valuation which was raised at the beginning.

Mr. Stein: I understand that.

You may examine, Mr. Vote.

• • •

CROSS-EXAMINATION

By Mr. Vote: (119-122)

Q. Now, Mr. Yaselli, you have testified the reasons why the Windisch-Gratz group wished to sell you a 13-million-dollar lira credit at 20 to one. Now I can realize why the seller would like to sell as dearly as possible but why would you in 1945 when the official rate of exchange was 100 lira to a dollar purchase that credit at 20 to one? You were, of course, interested in buying as cheap as possible. A. That is right.

Q. Why did you consent to what on its surface at least looks to be an imprudent investment? A. Because the price I was claiming was cheaper than I could ever build such a factory and was already set up and everything. I was getting something complete handed to me for less than I could ever build one, and I thought it was a bargain.

Q. Why didn't you just buy the shares without the credit? A. They wouldn't sell it that way.

Q. At the time you bought it, the plant was not in operation, was it? A. Was being put in operation.

Q. It had been bombed, had it not? A. Well not—just a portion of the factory or wall.

Q. Yes. Now you have testified that there were no debts on the factory. A. Not that I know of.

Q. It was free and clear? A. That is right.

Q. That this was based on examining the books? A. That is right.

Exhibit 4

Transcript of Hearing

Q. There were no debts other than to stockholders? A. Well, they created a debt there towards the last. They got the money from a Yugoslav bank to complete the reparation.

Q. Now, Mr. Yaselli, I show you a letter dated June 6, 1946, which purports to be a letter signed by you, addressed to AFHQ Caserta, G-5 Section. Can you identify this document as your letter? A. That is right. It is my letter.

Q. Mr. Yaselli, I want to quote from this letter as follows:

"There are many debts against the company in Trieste for salaries to the personnel and the other creditors as per inclosed list Exhibit 8 amounting to liras 566,311.40 and an indebtedness against the plant for the sum of 995,233.85 as per copy herewith inclosed and marked Exhibit Number 9."

Now, Mr. Yaselli, how do you reconcile your previous testimony——

Mr. Mason: Just one moment. I am going to object to——

Mr. Stein: He hasn't asked the question. He just quoted something and now is about to ask a question on that basis of that.

Mr. Hughes. I thought he asked him that.

By Mr. Vote:

Q. How do you reconcile your testimony here this afternoon with the statement contained in this document?

Mr. Mason: I am going to object to that, Mr. Hearing Examiner. Mr. Yaselli's testimony as recollected by Mr. Vote is not accurate. I put the question to Mr. Yaselli, and I do recall the question. I asked Mr. Yasseli whether there were any sub-

stantial debts, debts substantial in relation to the total value of the factory other than debts to the stockholders, and the answer to that question is no. There is no inconsistency whatever between that letter and the testimony which Mr. Yasseli gave this afternoon.

Another thing, these are debts which on the face of the letter accrued subsequent to the date on which the stock was purchased. They were not debts that existed in September of 1945. I, therefore, consider the question highly improper.

Mr. Vote: Mr. Stein, before I asked that question, I prefaced it by saying "You testified thus and so." He said he did testify thus and so. I say he did testify. It is based on my notes I made at that time. He stated after my prefatory statement that he had testified that. I say counsel is out of order now saying he didn't testify it. If he does, he is impeaching his own client.

Mr. Stein: The objection is overruled.

Will you give the best answer to that question that you can, Mr. Yaselli.

The Witness: When I purchased the factory and I went to see the factory, there were no debts. There were current debts after that which accrued from that time on amounting to these sums that I included in this letter which, when reduced to dollars, is a joke. It is just a few thousand dollars.

By Mr. Vote:

Q. Mr. Yaselli, your lira credit—— A. In comparison to a factory that is worth a million and a half dollars.

Q. Isn't it true, Mr. Yaselli, that that lira credit you brought reduced to dollars is a joke, too? Isn't it?

Exhibit 4

Transcript of Hearing

Mr. Mason: I object to that, Mr. Examiner. These questions are completely out of order. I think counsel is being argumentative.

Mr. Stein: He has withdrawn the question. Do you want to rephrase it?

Mr. Vote: No.

• • •

RE-DIRECT EXAMINATION

Mr. Hughes: (146)

Now as to the question of this letter of General Marshall which we introduced in evidence at the conclusion of the testimony, we wish only to point out that the significance of that letter to us is that clearly at the time when that letter was written, which was simultaneous, I believe, with the execution of the claims agreement, or at least with the negotiations leading up to it, the State Department itself considered this claim and, incidentally, this applies also to the Antivari claim because both are mentioned in that letter—the State Department apparently considered the claims of this claimant to be one of the factors that it was using in its negotiations with the Yugoslav government and on the basis of which the fund of 17 million dollars was finally computed.

Now I do not know how they arrived at the figure. It seems to us extremely unfortunate that it has turned out that that fund was insufficient and we quite understand that the Commission may find it therefore difficult to spread it around. On the other hand, it is not the function of the Commission, as we said in our brief, to decide which claimant looks

Exhibit 4

Transcript of Hearing

better than any other. We do not believe that is consistent with judicial determination.

Now the letter of General Marshall, of course, was not intended to constitute a directive to the Commission to decide any particular case in any particular way.

• • • (147-148)

What I started to say, Mr. Hearing Examiner, was the letter starts off with a statement that it is, of course, not to be construed as pre-judging the determination of any particular case by the Commission. We are not for a moment arguing, for instance, that the Commission is now bound to allow these claims. That is not the point. But what we are saying is that clearly at that time the State Department was "espousing" these claims, at least, to a degree. It was certainly using them as an item of bargaining with the Yugoslavs.

Furthermore, there is one other extremely interesting thing in that letter. It goes on to state that it not only covers and bars from any further claim against the Yugoslav government the claims based on indirect ownerships of property or enterprises through stock but also amounts to a complete discharge of any claim which the claimant may have against the enterprise.

Now what that means here—and this relates to some extent to the question of evaluation which was discussed at the very opening of this hearing—what that means is that the credit that Mr. Yaselli's company bought, the 12,012,000 lira which it bought, has been effectively discharged by the United States Government. He is no longer—his company, I should say, is no longer in a position to assert that

claim against the enterprise. Therefore, when it is stated to us, on the one hand, that we must look only at the net worth of the company, and, on the other, that this debt exists, we are obliged to call to the attention of the Commission that under that letter it is apparent that that debt was discharged, that that was part of the consideration given up.

Now under those circumstances, we think it is only right that that debt should be completely thrown out of consideration as a factor in valuing net worth. It would be true in any case because the debt was owed by the person who was the stockholder, but even more so where this letter itself indicates that that debt has been discharged and it is impossible for this claim to be made further for its collection.

• • • (151)

Mr. Stein: I understand from you, Mr. Hughes, you have no further evidence to introduce and no further comments to make.

Mr. Hughes: Off the record.

(Discussion off the record.)

Mr. Stein: Since it is desired to offer no other evidence and I understand that you have concluded your closing observations, Mr. Hughes, this hearing will now be closed at 5:50 p. m.

(Whereupon, at 5:50 o'clock p. m., the hearing was adjourned.)

Exhibit 5

UNITED STATES DISTRICT COURT (154

FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION No. 247-55

AMERICAN AND EUROPEAN AGENCIES, INC.
Plaintiff

v.

WHITNEY H. GILLILLAND, et al.
Defendants

AFFIDAVIT

DISTRICT OF COLUMBIA, ss:

WILLIAM P. ARNOLD, being first duly sworn, on oath deposes and says as follows:

1. That he is an attorney employed by the Department of Justice and one of the counsel for the defendants in this case.

2. That he was present at the taking of the deposition of defendant Henry J. Clay on Monday, June 6, 1955.

3. That pursuant to a Subpoena to Testify and to Produce Documents, defendant Clay was required to bring with him:

(1) The memorandum by the expert hired by the Foreign Claims Settlement Commission as to his views with respect to the value of the plaintiff's claim filed with the Foreign Claims Settlement Commission

of the United States, which said memorandum is referred to in paragraph 7 of the defendants' answer filed in this action.

(2) The report made to the defendants GILLILAND, PACE and CLAY by the Field Branch of the Foreign Claims Settlement Commission of the United States as to the value of the physical assets of the corporation known as FALLERSA, which said report is referred to in the Final Decision issued by the said defendants dated December 30, 1954 and referred to in paragraph 8 of the complaint filed herein.

4. That upon refusal to produce said documents on the grounds of privilege, the matter was submitted to Judge Edward M. Curran of this Court, in chambers, without a reporter present.

5. That Judge Curran ruled that the documents were departmental, inter-office memoranda not subject to discovery, and thus defendant Clay could not be required to produce them.

s/ WILLIAM P. ARNOLD
William P. Arnold

(Sworn to July 21, 1955.)

Exhibit 6

FOREIGN CLAIMS SETTLEMENT COMMISSION (12
OF THE UNITED STATES

Washington 25, D. C.

December 30, 1954

Coudert Brothers
777 Fourteenth Street, N.W.
Washington 5, D.C.

Claim of: AMERICAN & EUROPEAN AGENCIES, INC.
Docket No. Y-1578
Decision No. 1539

Gentlemen:

Enclosed is a copy of the Final Decision issued by the Commission on the above claim. This is the final disposition of the claim and this Commission is now treating it as closed.

Very truly yours,

Henry J. Clay
Commissioner

Exhibit 7

Final Decision

146) FOREIGN CLAIMS SETTLEMENT COMMISSION
OF THE UNITED STATES

Washington, D. C.

DOCKET No. Y-647
DECISION No. 1533

[SAME TITLE]

Counsel for Claimant:

COUDERT BROTHERS
777—14th Street, N. W.
Washington, D. C.

Final Decision

On November 26, 1954, a Proposed Decision was issued in this claim, denying it for the grounds there set out. Subsequent to the issuance of the Proposed Decision the claimant, through its attorneys, filed objections with accompanying brief, and requested a hearing, which was duly held.

In view of this Final Decision, it is not necessary to go into all points raised in claimant's brief or to elaborate in any degree on the evidence submitted at the hearing.

In the Proposed Decision, we held that the transaction was speculative and involved an illegal payment and that any award of over $20,000 would be subject to the demand of foreign citizens.

The record in this claim does establish that the transaction was speculative. Nevertheless, we do not consider that such speculation has been a reason for refusing diplo-
147) matic intervention. Claimant's point that it is, instead, the

speculative or exaggerated amount of claim which has inhibited diplomatic espousal is correct.

While claimant attempted to show at the hearing that the payment in dollars was not illegal, since Italian law in this respect applied only to Italian citizens, such evidence instead established that the payment was illegal, since Mr. Yaselli was a dual national of Italy and the United States. Nevertheless, since the transaction itself was legal, we do not consider the fact that an incident to that transaction was illegal under Italian law as sufficient to have excluded American diplomatic intervention.

Although an award of over $20,000 would be subject to the demand of foreign creditors, we do not consider the record as affirmatively establishing an actual assignment to aliens of the proceeds of the award. The fact that a particular claimant has foreign creditors would not of itself be sufficient to deny this claim.

Furthermore, while certain aspects of the transaction appear to have been extremely imprudent for an asserted "arm's length" transaction under the circumstances then prevailing, nevertheless these peculiarities are not deemed sufficient on the record before us to establish a question as to the *bona fides* of that transaction or of this claim.

The significant issue to us is whether the transaction was motivated solely by a design to put the property under American protection, in the face of emminent seizure by the Government of Yugoslavia. Certainly, the benefits to be derived from the sale of the stock to American interests were in the minds of the parties. However, at the time of the sale and negotiations leading up to the sale of the factory was located in Zone "B" on Italian territory. While Yugoslavia had manifested its intentions toward acquisition of the territory, Italy had not ceded its position that (1

it should retain the territory, and certain Western Powers, including the United States, had expressed their view that the determination of the ultimate disposition of the territory was an open question. (See Statement of Acting Secretary of State Grew concerning the "Italy-Yugoslavia Boundary", of May 12, 1945, Dept. of State Pub. #2669, European Series (1946), p. 153.) The acquisition of the territory by Yugoslavia could not, then, at such time have been considered imminent. Furthermore, the evidence shows that the Yugoslav authorities pursuaded the owner of the plant to get it back in production, and co-operated in the work of its restoration. It was not until April of 1946 that this attitude changed, and Fallersa officers were prohibited access to the premises. We conclude, therefore, that the transaction was not motivated solely by a desire to place majority ownership of Fallersa in American hands for the purpose of invoking diplomatic protection. Accordingly, we find that American and European Agencies is an eligible claimant under the Agreement.

As to the date on which the property of Fallersa was taken by the Government of Yugoslavia, we hold it to have been taken on September 15, 1947, when the Peace Treaty with Italy became effective in the territory of Ilirska Bistrica. The remaining question is one of valuation.

It is the claimant's position that it is the value of the property taken and not the value of the stock which it owned in Fallersa which should be the measure of its compensation. Claimant has filed a report dated March 2, 1948, signed by Battistella, Fallersa's Vice-President, giving the results of an appraisal said to have been made by one Alesandro Bolis, an expert registered in the records of Engineers in Trieste.
49) It is to be noted that this document is not itself an appraisal but is a "Report of Survey", although the entries are

sworn to as being correct. The report shows that the acquisition costs of the physical assets between March 3, 1941, to December 31, 1945 were as follows:

Lands	205,915.60 lire
Buildings	9,934,654.20 "
Machinery	10,995,673.50 "
Implements, furniture, merchandise, etc.	8,240,558.85 "
Total	29,376,802.15 lire

The report uses the date January 1, 1943, as the average date of reference and arrives at the value of the properties as of March 22, 1946, which it judges to be the date of taking, by multiplying the above figures by 11.60. The report then converts the lire into dollars at the official rate of 225 lire to 1 dollar, as follows:

Lands	2,388,621 lire	$ 10,616.00
Buildings	115,241,988 "	512,186.50
Machinery	127,549,812 "	566,888.00
Merchandise, etc.	95,590,483 "	424,846.50
Total	340,770,905 lire	$1,514,537.00

To determine the amount of the claim for its interest in Fallersa, claimant multiplies the total by 61.6%, its proportionate stock interest, and arrives at $932,954.79.

But claimant ignores the fact that its interest is based on the ownership of shares of stock and it is the value of such stock at the time of taking which is the proper measure of its compensation, as we have consistently held. The means utilized by claimant would be tenable only if Fallersa had no liabilities.

Final Decision

The Government of Yugoslavia has filed an appraisal of physical assets made by local authorities, on the basis of 1938 values, which finds their value as follows:

Land	159,132	lire
Buildings	1,808,801	"
Machinery	3,679,840	"
Movables	351,345	"
Total	5,999,118	lire

At the rate of 19.01 lire to the dollar (See Board of Governors of the Federal Reserve System, *Banking and Monetary Statistics* (1943), physical assets would be worth $315,576.96 at 1938 values. On the basis of an estimate made by our Field Branch the value of the physical assets would be approximately 32,000,000 dinars, as of 1938, or $727,272.72 converted at the rate of 44 dinars to 1 dollar.

While the Commission ordinarily bases its findings as to the value of stock on 1938 values, the special circumstances here inhibit this practice. Neither the factory nor Fallersa was in existence in 1938 and consequently there are no financial records of that year, which can be of assistance in determining the net worth of the company. For this reason, we have decided to base our finding as to the value of the stock on its book value on the date of taking, September 15, 1947, and convert such lire values into dollars at the official rate of exchange. Some precedent for this procedure is found *In the Matter of the Claim of Stefan and Anna Johsz* (Decision No. 1420), where we converted a bank account, established in 1942, from dinars into dollars at the official rate of exchange at the date of taking.

The book value may be determined from two sets of records filed by claimant, certified copies of Fallersa's balance sheets and certified copies of summary balance sheets

published in the Official Gazette of the Allied Military Government. Based on these documents, the book value of one share of Fallersa stock was as follows:

	1945	*1946*	*1947*	*1948*
Balance sheets	415.9 lire	403.68 lire	346.9 lire	350.4 lire
Summary	426.7 "	364 "	357.28 "	351.6 "

We conclude from all the evidence that the value of 1 (151
share of stock of Fallersa on September 15, 1946, was 350 lire. Converting that figure into dollars at the rate of 350 lire to the dollar, the legal rate at such time (See Intz, F. A. and V. C., *Monetary and Foreign Exchange Policy in Italy* (1950), Appendix, Table XI),** we arrive at $1.00 as the value of a share of Fallersa stock on the date of taking. Since Claimant owned 12,320 shares of stock of Fallersa, the value of such stock was $12,320.

Claimant takes the position that debts of Fallersa owed to it should not be taken into consideration in computing net worth. Claimant is apparently relying on Article 4(c) of the Agreement (see Hearing Transcript, p. 11) and expressly is relying on the letter of July 19, 1948 from the Secretary of State to the Yugoslav Ambassador (Transcript, pp. 147-8), which obviously was referring to the Article 4(c) provisions concerning debts owed to the owner of an enterprise.

There is no need to consider the validity of claimant's argument with respect to the effect on such debts of Article 4(c) or the letter of July 19, 1948, for that Article and letter have no application to the situation at hand. Article 4(c) applies expressly and exclusively to debts of enter-

** It is noted that the "Legal Free Rate" was 667 lire, the "Middle Rate" 508 lire, and the "Black Market Rate" 665 lire to the dollar in September 1947.

prises nationalized or otherwise taken by Yugoslavia. The debt here runs from Fallersa, an Italian corporation which has never been nationalized or taken by Yugoslavia. It is also manifest that the letter of July 19, 1948, can be referring only to enterprises nationalized or taken by Yugoslavia, when speaking of the discharge of debts, for the Governments of the United States and Yugoslavia would, of course, have no competence to agree on the discharge of a debt of an Italian corporation still in existence on July 19, 1948, and never nationalized or taken by Yugoslavia. We do not consider, therefore, that there is merit to claimant's argument in this respect, and it was proper to consider debts owed by Fallersa to claimant in computing net worth, for they were outstanding obligations on the day of taking and, indeed, are currently outstanding obligations.

Claimant also asks compensation for its proportionate interest in the reasonable value of the possession and enjoyment of the properties from March 31, 1946, the date on which the Government of Yugoslavia seized possession of them, until the date of nationalization. To support this item of the claim, an "Estimate of Operation" is included in the report of Battistella previously referred to. This estimate would appear to be utterly refuted, except as a projection of speculation, however, in view of Fallersa's balance sheets from 1945 which show continuing losses.

The Commission, in its determination of claims against Yugoslavia, is directed by the International Claims Settlement Act of 1949 to apply (1) the terms of the Agreement with that country and (2) the applicable principles of international law, justice and equity, in that order. The Agreement between the Governments of the United States and Yugoslavia contains no specific provision regarding loss of use of property, loss of profits, and the like. Generally, international and domestic arbitral tribunals in the deter-

mination of international claims allow compensation for indirect damages such as loss of use of property, loss of profits and the like, if such losses are reasonably certain and are ascertainable with a fair degree of accuracy. They do not allow compensation for indirect damages if they are conjectural or speculative or not reasonably certain or susceptible of accurate determination. See Borchard, *Diplomatic Protection of Citizens Abroad*, Sections 172, 173 and cases cited therein.

We are of the opinion that it has not been proven that it was reasonably certain that the profits expected or any profits would have been realized by claimants. The claim for such profits must therefore be denied. However, claimant may be compensated in terms of interest for the loss of the use of the compensation it was entitled to receive on (15
the date the property was taken, from the date of taking to the date of payment by the Government of Yugoslavia. Both the Agreement with Yugoslavia and the International Claims Settlement Act contemplate the allowance of interest by the Commission for the delay in payment of compensation by the Government of Yugoslavia.

Accordingly, in full and final disposition of this claim, an award is hereby made to American and European Agencies, Inc., in the amount of $12,320 with interest on that amount at 6% per annum from September 15, 1947, the date of taking, until August 21, 1948, the date of payment by the Government of Yugoslavia, in the amount of $688.56.

Dated at Washington, D. C.
Dec 30 1954

Exhibit 8

FOREIGN CLAIMS SETTLEMENT COMMISSION
OF THE UNITED STATES
Washington 25, D. C.

Coudert Brothers,
488 Madison Avenue,
New York 22, New York.
Attention: Mr. James E. Hughes

December 30, 1954

Re: AMERICAN AND EUROPEAN AGENCIES, INC.
Dockets No. Y-647 and Y-1578

Gentlemen:

At the hearing on the above claims held on December 22, 1954, you requested a second hearing on the question of valuation in the event either or both of the Proposed Decisions were reversed. Section 300.5(c) allows claimants to request "a hearing" where a claim is denied in whole or in part. Pursuant to that Section, by letter of December 4, 1954, you requested "a hearing". That hearing was afforded claimant on December 22, 1954 at which time you had opportunity to submit any evidence or oral argument you had on all elements establishing the claims, including the question of value. Indeed, the transcript of the record of these hearings shows that, in fact, you made oral argument with respect to the valuation of the stock.

It would manifestly be impractical and not in the interests of expedient adjudication to permit a particular claimant a series of hearings on various aspects of the claim.

The request for a second hearing must, therefore, be denied.

Very truly yours,

Whitney Gillilland
Chairman

Affidavit of James E. Hughes

UNITED STATES DISTRICT COURT (15

FOR THE DISTRICT OF COLUMBIA

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

JAMES E. HUGHES, being duly sworn, deposes and say:

(1) I am an attorney-at-law duly licensed to practice as such in the courts of the State of New York and in the United States District Courts for the Southern and Eastern Districts of New York. I am a member of the firm of Coudert Brothers and a partner of Mr. Percy A. Shay, the attorney for the plaintiff herein. I am fully familiar with all of the proceedings which have been taken in this action and also the proceedings which took place before the Foreign Claims Settlement Commission of the United States in connection with the claim of the plaintiff out of which this action arose. I make this affidavit in opposition to defendants' motion to dismiss this action or in the alternative for summary judgment.

(2) The plaintiff in this action is and at all times hereinafter mentioned was a New York corporation and the owner of 61.6% of the issued and outstanding stock of Fallersa, S. A., an Italian corporation. The said Fallersa was the owner of a factory located in Villa del Nevoso, which lies within territory ceded by Italy to Yugoslavia under (16 the terms of the Treaty of Peace signed in Paris on February 10, 1947. The factory owned by the said Fallersa was nationalized by the Yugoslav Government in 1947 upon that Government obtaining sovereignty over the territory in which the factory was located.

(3) In 1948 the Government of the United States and the Government of Yugoslavia entered into the so-called Yugoslav Claims Agreement of 1948 under which the Government of Yugoslavia paid to the United States the sum of $17,000,000 in settlement of all claims of the United States and of its nationals against Yugoslavia. In 1949 the Congress of the United States adopted the International Claims Settlement Act of 1949 (hereinafter called the "Act") providing for the establishment of the International Claims Commission (hereinafter called the "Commission"), a domestic United States Commission, which was given jurisdiction to receive, examine, adjudicate and render final decisions with respect to the claims included within the terms of the Yugoslav Claims Agreement. The functions of the International Claims Commission were transferred to the Foreign Claims Settlement Commission under Reorganization Plan No. 1 of 1954 effective July 1, 1954 (19 F.R. 3985).

(4) Pursuant to the provisions of the International Claims Settlement Act and the Rules and Regulations of the Commission, the plaintiff on May 31, 1951 duly filed with the Commission a claim based upon the nationalization of the aforesaid factory and requesting compensation in the amount of $2,157,539.50 (later amended by the plaintiff to $1,538,753.52) for such nationalization. Under the provisions of the Yugoslav Claims Agreement and of the International Claims Settlement Act, the plaintiff claimed compensation as the indirect owner of the properties and the Commission has already determined that plaintiff's claim is a valid claim within the provisions of the Yugoslav Claims Agreement and the Act. Accordingly, no question with respect to the plaintiff's right to compensation is raised by this action.

(5) At the time of the filing of its claim, plaintiff, pursuant to the Regulations of the Commission, submitted certain evidence in support of the value of its claim. This

evidence consisted of a detailed description of the property nationalized by the Government of Yugoslavia and an appraisal of the value of that property and of the value of the use and occupation thereof between the date of the physical taking of the property by the Government of Yugoslavia and the passage of title to said property to the Government of Yugoslavia. A copy of the English translation of the appraisal submitted by the plaintiff to the Commission upon the filing of its initial claim with the Commission is attached to this affidavit as Exhibit A. An examination of this exhibit shows that it is an exhaustive and detailed appraisal of the property by an engineer thoroughly acquainted with the property.

(6) Subsequent to the original filing of its claim and the various documents in support thereof, the Commission from time to time requested the plaintiff to submit additional information and additional documents in connection with various phases of the claim. Among these requests the plaintiff's attorneys received a letter from the Commission dated October 22, 1951 requesting the plaintiff to submit, among other things, "certified balance sheets" of Fallersa for the year 1938 and years subsequent thereto. A copy of this letter is annexed hereto as Exhibit B. In response to this request the plaintiff submitted the balance (18
sheets of Fallersa for the years 1941 through 1950 as published in the Official Italian Gazettes and complete detailed balance sheets taken from the books of account of Fallersa for the years 1945 through 1948, these being the only records of the type requested by the Commission available to the plaintiff and covering years which were relevant to the plaintiff's claim. Copies of English translations of these balance sheets as filed with the Commission are annexed hereto as Exhibit C.

(7) The Commission by letter addressed to plaintiff's attorneys dated November 12, 1953 (a copy of which is an-

nexed hereto as Exhibit D) requested, among other things, further information from plaintiff with respect to the basis upon which the plaintiff had valued its claim. In response to this letter, the plaintiff submitted an explanatory note and a copy of certain regulations of the Italian Government dealing with the equalization factors to be applied in certain cases to adjust for the devaluation which had occurred over the years in the Italian lira and to which reference had been made in the appraisal of the nationalized properties submitted by plaintiff. (A copy of the explanatory note and the English translation of the Italian Regulations are annexed hereto as Exhibit E.) The plaintiff also submitted the affidavit of Mr. E. Paul Yaselli, its President, verified February 9, 1954. (A copy of this affidavit is annexed hereto as Exhibit F.)

(8) The documents referred to hereinabove and annexed hereto were and are the only documents on file with the Commission which plaintiff has ever examined relating to the value of its claim and the Commission has refused to permit plaintiff or its attorneys to examine any evidence of value in the hands of the Commission except the statement filed by the Government of Yugoslavia as to its opinion of the value of the properties. This document the defendants produced upon plaintiff taking the deposition of Mr. Clay in this action. However, all other reports, memoranda, and other documents relating to value the Commission refused to produce although subpoenaed. The Commission specifically refused to produce the appraisal of the properties prepared by its field agents and referred to in the Final Decision of the Commission and the opinion of the expert hired by the Commission referred to by the Commission's attorney at the hearing on the claim. (See transcript of hearing on plaintiff's claim para. 7.) The Commission at no time other than as hereafter set forth indicated or suggested to plaintiff or its attorneys that any problem with respect to the valuation existed or that the valuation sub-

mitted by plaintiff was to any material degree questioned by the Commission.

(9) A substantial issue did arise, however, as to the validity of the claim itself and as to whether the claim would be determined as falling within the terms of the Yugoslav Claims Agreement and the Act. This issue was brought to plaintiff's attention in the following manner:

> Due to the fact that Congress had directed the Commission to complete its work on the Yugoslav claims by the end of 1954, and having been informed that the Commission was making every effort to do so, other members of my firm and I in or about September 1954 became concerned about the delay in obtaining action on several claims filed by clients of the firm and accordingly requested Mr. Percy A. Shay, one of the members of the firm who maintains his office in the Wyatt Building in Washington, D. C., to request an informal conference with one or more members of the Commission, for the purpose of determining what steps would be taken by the Commission in disposing of pending claims prior to December 31, 1954. Mr. Shay was requested to point out to the Commission that the short period then remaining before December 31, 1954 might make it necessary for the Commission to assign hearings or request the filing of supplemental documentation in support of claims within periods of time which would be too brief to permit proper preparation. (20
>
> As a result of this request, Mr. Shay arranged an interview with Mr. Henry Clay, who was then Acting Chairman of the Commission. This interview was held at Mr. Clay's office in Washington on October 5, 1954 and was attended by Mr. Clay, a Mr. Vote (an attorney on the staff of the Commission), Mr. Shay and myself. Mr. Vote, however, was not present during a brief part of the interview.

Although I did not expect to discuss at this interview the merits of any of the various claims which I was then handling but was interested rather in matters of procedure, and particularly the problem of available time for the proper preparation for hearings which might be held on claims, Mr. Clay at the very outset of the interview indicated a desire to discuss the facts of some of the claims and particularly the claim involved in the present litigation.

Mr. Clay stated that he was "not going to pull any punches"; that he was quite troubled about Mr. Yaselli (the plaintiff's President), personally; that the plaintiff's claim on itse face appeared to be valid, and that an award would probably be made if the Commission could be satisfied about Mr. Yaselli himself.

Mr. Clay further stated that he personally had attempted to find out how Mr. Yaselli after having been in Italy and Germany during World War II had obtained the return of his United States passport after the war and in this connection, he, Mr. Clay, had made certain inquiries through the American Embassy in Rome. Mr. Clay stated that he felt that Mr. Yaselli might have engaged in activities which were improper for an American citizen and might have as a result lost his citizenship. He also stated that he was very much troubled about the unfavorable publicity which might well ensue if an award were granted to a man whose connections with the German and Italian enemy governments during war years might be questionable; that if an award were granted it would probably be a substantial one, and that this was what concerned him particularly. He further stated that if the amount involved in the claim were only a few thousand dollars, there would be no fear of criticism.

Mr. Shay and I advised Messrs. Clay and Vote that nothing in the conduct of Mr. Yaselli (who had at that time been a client of our office for some seven years) had ever led us to believe that he was not completely correct in his dealings. However, we stated that we had no information as to the subject matter referred to by Mr. Clay, but would discuss it with Mr. Yaselli.

Mr. Clay then advised us that a valuation of the nationalized properties covered by the claim involved in this litigation was being prepared by the Commission's field agent in Yugoslavia, but had not yet been received in Washington. Accordingly, the case was not yet ready for decision from the valuation standpoint, even if the point concerning Mr. Yaselli's citizenship could be resolved. Mr. Clay stated that the Commission's schedule then called for the receipt of all reports from field agents by November 1, 1954; the issuance of all Proposed Decisions of the Commission by November 15th; and the calling and holding of any required hearings in the remaining six weeks of the calendar year.

I indicated to Mr. Clay that this seemed a difficult program to carry out and was concerned that Proposed Decisions in our cases might be issued as late as the first of December, in which event we would have insufficient time available for proper preparation of the necessary material for hearings.

Mr. Clay stated that this might be so but that he expected and intended to complete the work of the Commission by December 31, 1954 and would under no circumstances request an extension of time or an additional appropriation from Congress to permit the Commission to continue its work on the Yugoslav claims after the end of 1954. Mr. Clay stated that he had assured the Administration when

he took office that he would conclude the work on the Yugoslav claims by that date.

Following the above interview, I advised Mr. Yaselli of the question of his citizenship raised by Mr. Clay and obtained from Mr. Yaselli the facts with respect to the matters raised by Mr. Clay. I then prepared a memorandum for Mr. Shay dated October 13, 1954 (a copy of which is hereto attached as Exhibit G). This memorandum was addressed by the New York Office of Coudert Brothers to Mr. Shay and was exhibited by Mr. Shay to Mr. Clay on October 20, 1954.

Mr. Shay later advised me that upon reading my memorandum dated October 13, 1954 (Exhibit G hereto), Mr. Clay requested that Coudert Brothers, as attorneys representing the plaintiff, furnish to the Commission a "full statement of Mr. Yaselli's movements from and outside this country during World War II and after World War II." As a result of this request, my associates and I prepared an extensive series of questions in the form of written interrogatories to submit to Mr. Yaselli for the purpose of obtaining from him the information requested by the Commission. A copy of these interrogatories was furnished to Mr. Shay in Washington and he was requested to submit the same to the Commission for the purpose of determining whether the answers to these interrogatories would furnish the information which the Commission desired.

I was advised by Mr. Shay that on October 27, 1954 he submitted the list of questions to Mr. Spangler, the then Solicitor of the Commission and formerly acting Commissioner, who was familiar with the plaintiff's claim; that Mr. Spangler upon reviewing the interrogatories had stated that he had no objection to the manner in which we were pro-

ceeding but that he was more interested in the agreements relating to the acquisition of the stock of Fallersa by the plaintiff than in any testimony which might be developed.

As a result of these statements the original copies of all documents pertaining to the claim and particularly those relating to plaintiff's acquisition of the stock of Fallersa were submitted by my associate, Mr. Mason, and Mr. Shay on November 9, 1954 to Messrs. Spangler, Clay and Vote.

Late in the afternoon of November 9, 1954, I (24
received a telephone call from Mr. Shay stating that he and Mr. Mason were then attending a conference with Mr. Clay, Mr. Spangler, and Mr. Vote; that the original documents in plaintiff's claim had been submitted to these gentlemen; that Mr. Spangler and Mr. Clay had suggested that Mr. Yaselli appear before them personally so that they might examine him as to the facts of his personal background and any other facts concerning the case which they might deem important, and that he, Mr. Shay, had been told the Commission felt that this was the best manner of clearing up their questions. Mr. Shay requested that I join Mr. Mason and himself in Washington the following day to attend the examination and stated that Mr. Yaselli would attend.

On the evening of November 10, 1954 a meeting was held in Mr. Clay's office in Washington which was attended by Mr. Clay, Mr. Vote, Mr. Spangler, Mr. Yaselli, Mr. Shay, Mr. Mason and myself. Mr. Yaselli was asked to go over the entire matter of his stay in Europe during the war and the background facts of the plaintiff's acquisition of shares of stock in Fallersa.

At the conclusion of the meeting, Mr. Clay stated that the question of value of the nationalized prop-

erty still remained and that the Commission had not yet arrived at any decision on this point. Mr. Clay was asked what value the Commission's appraisers had arrived at but he refused to state what value had been assigned to the nationalized property by the Commission's field agent or even to state whether a value had been determined by the field agent. Mr. Spangler did state, however, that the Yugoslav Government itself had valued the property at about $300,000.

On November 26, 1954 deponent received a telephone call from Mr. Clay in Washington, D. C. stating that the Commission was still upset as to what to do about the claim involved in this case; that it had been decided to issue a Proposed Decision denying the claim but to give Mr. Yaselli an opportunity to be heard before all three Commissioners. Mr. Clay stated that this had never been done before but that the Commission was still troubled about Mr. Yaselli's character and felt that it should not act on the case finally without having him appear as a witness and state the background facts of his case fully—and this time under oath—if he was prepared to do so. Mr. Clay added that the Commission as a whole, and he particularly, were influenced in this by the fact that he (Mr. Clay) had been informed that Mr. Yaselli had been charged with "bribery" in 1921 and later with "collusion" in 1923. Mr. Clay stated that he understood that neither case had resulted in any conviction of Mr. Yaselli but felt that we might well look into the mater. No mention was made of the valuation of the claim.

During the following week deponent received the Proposed Decision which had been signed by Mr. Clay on November 26, 1954 (the day of his phone call) and which did deny the claim in full as Mr.

Clay had said it would. (A copy of the Proposed Decision has been submitted by defendants in support of their motion.) The Proposed Decision contained no reference whatsoever to the question of valuation.

During the week following November 26, 1954, deponent discussed with Mr. Yaselli the charges referred to by Mr. Clay and determined that two (26
charges had been made against Mr. Yaselli in the 1920's; that one of the charges had been dropped by the prosecution, and that in connection with the other Judge Learned Hand (then a District Court Judge) had stated the following with respect to Mr. Yaselli:

> "It seems to me that there is no evidence whatever that there suggests any shadow upon him."

During the said week following upon November 26, 1954, deponent made two atempts to reach Mr. Clay on the long distance telephone in order to inform him of the facts stated above, but the call was never answered in either case.

By letter dated December 14, 1954, there was filed with the Commission pursuant to Section 3005(c) of the Commission's Regulations the plaintiff's objections to the Proposed Decision and an assignment of the errors relied upon together with a request for a hearing. (A copy thereof is attached hereto as Exhibit H.)

The hearing before the Commission was scheduled by the Commission for December 22, 1954 at 2:00 o'clock in the afternoon, as appears from the letter of the Commission attached hereto as Exhibit I.

Upon arriving at the hearing, I was surprised to find that none of the Commissioners was present and

that a hearing examiner, Mr. Stein, was prepared to proceed with the matter. I informed Mr. Stein that I had understood that the Commissioners would be present. Mr. Vote, the Commission's attorney, stated that he had also understood that one or more of the Commissioners was to attend. Accordingly, the hearing was delayed for several minutes, but eventually Mr. Stein stated that he thought we should proceed, since he had no instructions to the contrary. I state these facts because they do not appear from the written record of the hearing since the stenographer did not commence the taking of a record until Mr. Stein actually convened the hearing. Because of the extraordinary nature of what occurred immediately after the hearing formally opened, I will not attempt to describe the same in this affidavit but respectfully refer the Court to the transcript of the hearing (pages 1-14) which defendants have submitted in support of their motion.

(10) The above facts are stated on the basis of my personal recollection after having refreshed my recollection by memoranda and other records kept during the course of the prosecution of the plaintiff's claim before the Commission.

(11) It will be noted from the foregoing, and I hereby affirmatively state, that plaintiff's attorneys were never informed by the Commission or any representative thereof of any proposal to assign a nominal value to the claim involved in this case prior to the time when the hearing was convened by Hearing Examiner Stein (and to the best of my knowledge, information and belief plaintiff never received such information prior to such time); that on the contrary (as appears from the foregoing), every indication which had been given to deponent by the Commission and its representatives was to the effect that if the claim was allowed on its merits a substantial award could be expected. Furthermore, deponent was never informed prior to the

time when the said hearing was convened by Examiner Stein that evidence on the question of valuation, or any particular aspect thereof, would be received at the hearing.

(12) On December 31, 1954 I received a letter dated December 30, 1954 signed by Mr. Clay, with which was enclosed a copy of the so-called "Final Decision" of the Commission (a copy of which defendants have submitted in support of their motion). On the same day I received a letter dated December 30, 1954 signed by defendant Gilliland containing a denial of the application which had been made on behalf of the plaintiff for a hearing on the question of the valuation of the claim. A copy of this letter is attached hereto as Exhibit J. By letter dated January 7, 1955 (a copy of which is annexed hereto as Exhibit K), the plaintiff requested the Commission to reconsider the application for a hearing on the issue of valuation and to reconsider its so-called "Final Decision" and upon such reconsideration correct the manifest errors in the determination of the value of plaintiff's claim. The Commission took no action on these applications and plaintiff subsequently commenced this suit.

(13) Subsequent to the commencement of this action the defendants moved to dismiss the action on the grounds that the Commission did not have jurisdiction subsequent to December 31, 1954 to reconsider the plaintiff's claim. This motion was denied by Judge Curran of this Court and on April 15, 1955, plaintiff's attorneys delivered to Hon. Robert L. Toomey, one of the Assistant United States Attorneys representing defendants, a request that this action be settled by the Commission granting the hearing requested. A copy of the letter containing this request is annexed hereto as Exhibit L. However, this request was ignored by the defendants.

/s/ JAMES E. HUGHES
James E. Hughes

(Sworn to May 14 1956.)

Exhibits A to G—not printed

Exhibit H

(Printed as Exhibit 2, p. 31)

Exhibit I

(Printed as Exhibit 3, p. 33)

Exhibit J

(Printed as Exhibit 8, p. 66)

Exhibit K

(109

January 7, 1955

FOREIGN CLAIMS SETTLEMENT COMMISSION
OF THE UNITED STATES
Washington 25, D. C.

Re: Claim of American and European Agencies Inc., Docket No. Y-647, Decision No. 1533.

Gentlemen:

We are in receipt of the letter dated December 30, 1954 addressed to us in connection with the above-noted claim by the Chairman of your Commission, Honorable Whitney Gillilland, advising us of the denial of our request for a hearing on the issue of the "valuation" of the above claim. We have also received a copy of the Final Decision issued on December 30, 1954 by the Commission in connection with the above-noted claim.

In the Final Decision the Commission held that "it is the value of such stock (the stock of Fallersa owned by the Claimant) at the time of taking which is the proper measure of its compensation." However, it appears from the Final Decision that the Commission has determined the "value" of such stock in a manner wholly inconsistent with the evidence presented to the Commission. In view of the patent and obvious errors in the determination of the valuation of the above-noted claim which appear on the face of the Final Decision, we feel compelled to apply for the following relief:

(1) That the Commission reconsider our application for a hearing on the question of "valuation" and upon such reconsideration grant the same, or

(2) That the Commission correct the errors in the determination of the value of the claim which appear in the Final Decision.

Exhibit K

It is obvious upon a reading of the Final Decision that the Commission has computed the value of the stock of Fallersa owned by the Claimant on the basis of the lire figures appearing on the balance sheets of Fallersa submitted to the Commission by the Claimant. However, it
110) is clear that the lire amounts attributed to the assets of Fallersa on these balance sheets were not intended to nor do they constitute any evidence whatever of the actual value of the assets owned by Fallersa and taken by the Yugoslav government. Neither the Claimant, the Commissioner's own agents nor even the government of Yugoslavia at any time contended that these figures were in any way indicative of the value of the properties owned by Fallersa. On the contrary, it clearly appears from the documents submitted to the Commission that these figures are merely a statement of the actual number of Italian lire expended by Fallersa during the period from 1941 to 1945 in connection with the acquisition of the properties, without adjustment thereof to reflect the substantial devaluation of the lire which occurred during the period above specified.

It is clear from the Final Decision that this fact was evident to the Commission itself since in the Final Decision the Commission admits that the assets have been valued by the Yugoslav government at $315,576.96 (110,451,936 lire converted at the rate of 350 lire to the dollar), by the Commission's own agents at $720,272.72 (254,545,452 lire converted at the rate of 350 lire to the dollar), and by the Claimant at $1,514,537 (340,770,905 lire converted at the rate of 225 lire to the dollar). In spite of the fact that the Commission had before it these three appraisals and valuations of the properties of Fallersa taken by the Yugoslav government, the Commission completley disregarded the same (without stating any reasons therefor) and computed the value of the stock of Fallersa owned by the Claimant

on the basis of a valuation of the properties amounting to approximately $84,000 (29,400,000 lire converted at the rate of 350 lire to the dollar). The magnitude of the error committed by the Commission in this regard can be readily appreciated when it is realized that the value of the stock of Fallersa owned by the Claimant as computed on the basis of the appraised value of the assets of Fallersa as determined by the Yugoslav government amounts to more than twelve times the value of the stock as determined by the Commission in the Final Decision, and if computed on the basis of the value of the assets as determined by the Commission's own agents, the value of the stock amounts to more than twenty times that determined by the Commission.

Accordingly, it is submitted that the determination of the value of the stock of Fallersa owned by the Claimant as made by the Commission has absolutely no foundation in fact and is not supported by any evidence whatever before the Commission. The Final Decision on the issue is therefore in direct violation of the express provisions of the Act of Congress under which the Commission has been established and constitutes a palpable abuse of discretion. (See Section 4(b) Public Law 455—81st Congress.)

We also wish to point out to the Commission that the (111
determination made in the Final Decision to the effect that "Article 4(c) of the Agreement is not applicable in this case" is also without rational basis. Clearly the term "enterprise" as used in the Yugoslav Claims Agreement was intended to refer to the business operated in connection with the properties nationalized by the Yugoslav government. The error in the Commission's determination in this regard is evident when it is realized that the provisions of Article 4, subsections (b) and (c) apply not only to "enterprises" owned by juridical persons but also to "en-

terprises" owned by natural persons. In view of this fact, the Commission's determination that the value of the claim cannot include the value of the debt owed to the Claimant by the "enterprise" is wholly erroneous and should be corrected by the Commission.

We wish to point out that the Act of Congress under which this Commission was organized clearly and explicitly grants to each claimant whose claim is approved for less than the full amount thereof the right to a hearing before the Commission on the question of valuation. (See Section 4(h) Public Law 455—81st Congress.) In this case a request was made by the Claimant to the Commission immediately after the Claimant was first advised by the Commission that the claim, if allowed, would not be allowed for the full amount claimed. In spite of this timely application, however, the Commission arbitrarly refused to grant such a hearing and arbitrarily refused to disclose to the Claimant the facts upon which it intended to base its determination of valuation or the manner in which valuation would be computed. It is submitted that this denial constitutes a violation by the Commission of the rights granted to the Claimant under the Act of Congress establishing the Commission. (See Sections 4(h) and 4(j) Public Law 455—81st Congress.)

The Claimant hereby requests that immediate consideration to the within application be given by the Commission and that the Claimant, through its attorneys of record, be notified of the decision of the Commission on such application.

Very truly yours,

COUDERT BROTHERS.

Exhibit L (113

April 15, 1955

Hon. Robert L. Toomey
Assistant United States Attorney

Re: *American and European Agencies, Inc.* v. *Gillilland, et al.*

Dear Mr. Toomey:

You will find enclosed herewith our Memorandum of Points and Authorities in Opposition to the Defendants' Motion for Reconsideration of their Motion to Dismiss. As you know, the basic dispute which our client has with the Foreign Claims Settlement Commission is that the Commission failed to grant a hearing on the question of the value of the claim and then determined its value in complete disregard of the evidence submitted by the claimant, by the Commission's own investigators, and by the Government of Yugoslavia. We felt at the time of the issuance of the Final Decision, and we feel now, that if a hearing on the value of the claim were held, we would be able to establish to the satisfaction of the Commission that the claim filed by our client is of a value far in excess of that recognized by the Commission.

Shortly after the issuance of the Final Decision, we filed with the Commission an application for reconsideration of our application for a hearing, and set forth therein a detailed statement of the patent errors made by the Commission in determining the value of the claim. We are enclosing herewith a copy of that application.*

As we now understand the position of the defendants, our application was not acted upon by them in the belief that

*[Enclosure referred to is Exhibit K, above.]

Exhibit L

the Commission did not have jurisdiction after December 31, 1954 to conduct the hearing requested. The Court's determination of defendants' Motion to Dismiss, however, sustains such jurisdiction. It follows that a hearing, if conducted by the Commission at the present time, would be entirely valid and proper, and that the Commission would have the power to amend its award to our client on the basis of such a hearing. It has, therefore, occurred to us that the Commission might now be willing to reconsider our application for a hearing.

114) If a hearing were granted at this time, the present litigation could be brought to a conclusion, and what may well be long drawn-out court proceedings would be avoided. This would certainly be to the best interests of the other claimants who have received awards from the Commission, as well as the Commission itself.

Accordingly, in the interest of curtailing litigation, we are presuming to suggest that you discuss with the Commissioners the possibility of their now granting a hearing to our client on the question of the value of its claim, as previously applied for.

Very truly yours,

COUDERT BROTHERS

Transcript of Colloquy Preceding Argument of Motion

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

DOCKET No. 247-55

[SAME TITLE]

(1-20)

Washington, D. C.
Wednesday, May 23, 1956.

The above-entitled matter came on for hearing before Honorable Robert N. Wilkin, in Courtroom No. 14, United States Court House, Third Street and Constitution Avenue, Northwest, Washington, D. C., commencing at 10:00 o'clock a. m., on Wednesday, May 23, 1956.

APPEARANCES:

On behalf of the plaintiff:
Percy A. Shay, Esq.
and
James E. Hughes, Esq.

On behalf of the defendant:
Robert C. Toomey, Esq.
Assistant United States Attorney.

PROCEEDINGS

Mr. Shay: Good morning, your Honor.

Your Honor, in the early stages of the case of American and European Agencies against Gilliland, my partner, Mr. Hughes, of the law firm of Coudert Brothers, of New York, has taken the major lead in these matters. I am

appearing as local counsel, and for that reason I respectfully request your Honor to permit Mr. Hughes, a member of the Bar of the highest Court in the State of New York, to participate in this case. He will have the most active participation, if your Honor approves.

The Court: Very well. I do.

Mr. Hughes: Thank you very much.

The Court: As I understand it, this case was set first for pretrial conference and then for hearing on a motion to dismiss.

Mr. Hughes: Actually there are three motions for preliminary injunction which first came on a year ago and was suspended while another case was pending. That was set first, I believe, for May 2nd; isn't that right?

Mr. Toomey: Approximately.

Mr. Hughes: Then, immediately before that was to be heard, a few days before, Mr. Toomey advised us that he wanted to move for summary judgment, cross move. That was then set, I believe, for the 17th, or thereabouts, for argument.

Before that came on, however, the case had been reached on the calendar for pretrial and was set, I believe, for pretrial conference on the——

Mr. Toomey: 16th.

Mr. Hughes: And I believe Judge Laws assigned the entire case to your Honor.

That is my understanding of it.

The Court: Well, I bring it up to ask this question: Is there any occasion for a pretrial conference? Can we hope to accomplish anything by pretrial?

Mr. Toomey: I would certainly think not, your Honor, until after the motions were heard, in any event, because if the Government is successful on its motion, of course there would be no pretrial, in any event.

Mr. Hughes: I think that is correct.

On the other hand, there are really two branches to the Government's case.

One involves a pure question of law, with the jurisdiction of the Court; and the other involves a question of whether, if there is jurisdiction, certain things took place. On that one, of course, there would be an issue of fact, and that could very well involve a full trial, and pretrial conference would probably be useful.

So I think probably Mr. Toomey is correct.

The first branch, the jurisdiction, should be disposed of.

Mr. Toomey: Of course, I don't concede even on the so-called second branch, that either a trial would be called for, or I wouldn't have filed for summary judgment.

Both should be argued and then pretried, if pretrial is necessary.

Especially is that true since part of the motion is to jurisdiction.

Obviously if my point is well taken on jurisdiction, it would be futile to be pretrying the case.

The Court: Of course, what I had in mind, I have read the pleadings and the briefs or memoranda, whatever you want to call them, and I understand the issues.

It strikes me that if it were possible to give the claimant a hearing on valuation——

Mr. Hughes: Yes, sir.

The Court: ——that might be the simpler and speedier thing to do.

Mr. Hughes: That has been our feeling, of course, since the inception of this, that this whole business, while it is a tremendously interesting litigation, could be disposed of in five minutes, if the Commission voluntarily would give us the hearing, or the Court would order it. But, so far, despite three attempts to get it, we have not received any indication from the other side that they are willing to extend it. That is why we are here.

The Court: I get, from the reading I have done in the case, that the other side says emphatically this Court has no authority to order; and in the second place, there is no

possibility of their granting it, because their authority is exhausted.

Mr. Hughes: That is their contention.

The second part of that, of course, about the exhaustion of authority, has already been disposed of by this case, by motion which the Government made way back a year ago. That motion was addressed to Judge Curran, requesting the motion be dismissed because the Commission expired on December 24.

Judge Curran denied the motion, so we take the position that as far as the District Court is concerned, that motion has been dismissed.

Of course, they can raise it on appeal, if the Government wishes to do so.

The Court: I would agree with you, as a matter of law. I have always refrained from giving a decision contrary to any decision of an Associate in a Court where I sit.

Mr. Hughes: As I say, they can always raise it on appeal.

The Court: But the fact may still remain, I don't know if it is a fact, that the Commission has exhausted its power, and there is nothing it can do.

Mr. Hughes: The Commission is still in existence. The three people are still functioning. They have other claims to adjudicate, and consequently there is no practical problem involved here. They could operate, they could call the hearing and hold it. It is not a question here that there is no longer a Commission, which in some cases has been true, but that is not true here.

The Court: Have they filed a final report as to this fund?

Mr. Hughes: Well, as to this fund, your Honor, of course they have taken the position they have given all the awards that they can give, and as of December 31st, 1954, their position has been that they are finished.

Now, we have denied that, and Judge Curran sustained us, that that was not so.

If they had failed to finish a particular case, they were not finished, and his position was that the question of whether there had been a hearing or not was an issue of fact which should be determined, and that is why the case was placed on the trial calendar.

His feeling was that if it were determined there had not been a hearing after the trial of the facts, then presumably a hearing could still be ordered by the Commission, but he was not disturbed by the December 31st date.

So, as I say, we take the position that that issue for the time being for the District Court, has been disposed of.

The Court: Well, I am not ruling on it. The point I have in mind is what I raised first: Is there anything to be accomplished by pretrial discussion? If you admit that it is possible for the Commission to order a hearing or a rehearing or another hearing, whatever you wish to call it, merely to give the claimant a chance to come in and file what it wishes to file and say what it wishes to say about a valuation, I would think a pretrial conference would be in order, and I think that would be better if it could be disposed of by that method, rather than to pursue long litigation.

Mr. Hughes: That is what we have felt, your Honor, exactly, but so far as the Government is concerned, they have shown no disposition to consider the matter.

Mr. Tooney: Well, of course, we filed our original motion, which was heard by Judge Curran, in good faith. We believe that it was a well-taken motion, that our theory is correct, and we still think so. And accordingly we would be entirely inconsistent by agreeing that this Commission should take any action with respect to Yugoslavia claims, in view of our feeling and the Commission's feeling that it has no statutory authority to do it. As we read the statute, it has none, and obviously, if it hasn't, then it can't

conduct further hearings if it were disposed of. Secondly, we think they have had all they are entitled to, anyway.

The Court: Well, if that is your stand, and that is based on the principle that you cannot sacrifice, then there is no occasion for pretrial discussion.

Mr. Toomey: I think not.

The Court: But certainly it is apparent to anybody with a little administrative judgment that if we were back at the beginning and application were made for some further hearing on the matter of a valuation, it would be simpler to grant a little hearing, or as much hearing as required.

Mr. Toomey: I agree with your Honor.

Mr. Hughes: I want to add one more point to that. We have been continually accused by some of the other claimants of holding up the disposition of the fund, as far as they are concerned. They have had a partial distribution, but the rest has been held up, and I would like to point out that the thing that is holding this case up now is not ourselves. We have been ready to go through with evaluation hearings since January a year ago, and I only say that because amicus curiae brief has been filed here again, and I have not had a chance to read it, but I imagine that point has no doubt been brought up where we have been accused of holding up the rights of other people.

The Court: I read it rather hurriedly last evening, but I don't recall that they are blaming you.

Mr. Hughes: If they have not this time, they have before. This matter, as far as we are concerned, if we were granted a hearing on evaluation, the whole matter could be disposed of, including the Commission hearing, within a month.

The Court: Then all legal questions disappear, because it is conceded on all sides from that that there is no appeal.

Mr. Hughes: We certainly do not contend——

The Court: If there were any disposition on the part of the Commission to allow a further hearing, to allow the filing of whatever claimant wishes to file, and give the claimant a reasonable time, and a hearing, I would think offhand that that could be arranged for without sacrifice of any legal point that is pending.

Mr. Hughes: You could reserve your position, if you want.

Mr. Toomey: The reservation of a position would be completely useless. Once again, this takes us back to the fundamental problem which we raised in the first place. We don't think we have any jurisdiction over Yugoslavia claims.

Now, obviously in that situation we can't offer even to give them a hearing any more than this Court can hear something over which it has no jurisdiction.

In other words, regardless of the Court's disposition to hear it. The Court might like to hear it, but if it has no jurisdiction, it hasn't.

The Court: I presume that a hearing, if it resulted in an increase of evaluation, would set some other litigation in motion, maybe other claimants.

Mr. Hughes: Probably not, your Honor, because under the way the Yugloslavia law itself was set up, the law establishing this Commission, one claimant was not permitted to object to an award made to another claimant. That was clear.

In other words, to avoid endless litigation, the Commission was supposed to take both the favorable and adverse position in considering all claims, and it was made perfectly clear that individual claimants would not object to each other's awards; if the Commission on rehearing did order an increased award, I don't think that any other claimant would have a right to object to that award. The money has still been held up sufficiently, you see, to cover this claim, no matter what amount was awarded, so I don't

think there would be any additional litigation from that course.

Mr. Toomey: Your Honor, while standing here I had another thought in the matter of avoiding pretrial, and that is this: Let's argue the Government's motion to dismiss, or for summary judgment. We will also hear on the plaintiff's motion for preliminary injunction. If the Court, at the conclusion of the argument, rules against the Government, then the Court would enter a preliminary injunction. The Government could then appeal and all of these questions could be finally decided on appeal. If we lose in the Appellate Court, there would be nothing left to do except to take the case back, because all of these questions would be finally resolved in the Court of Appeals, and we would have no place to go. There would still be no room for a pretrial.

The Court: I see your point.

Mr. Hughes: I take it, then, if I understand what Mr. Toomey is suggesting in effect is the Government in effect would concede, merely for purposes of arriving at some kind of arrangement here, the question as to whether or not there was a hearing, the factual question, and they would rest on the point of law, and the Court, if the Court found it did have jurisdiction, then an order would be entered in favor of the plaintiff here, ourselves, and that would be appealed presumably by the Government to raise the question of jurisdiction in the Court of Appeals.

Is that, in effect, what you are suggesting?

Mr. Toomey: We would raise the motion presently before Judge Wilkin, addressed to three propositions.

First, this Court has no jurisdiction over the case.

Secondly, although it is not set up in this order, let's state it secondly, that the Commission has no jurisdiction.

Thirdly, that what happened was before the Commission, which is before the Court now, was all that they were entitled to. They got what they were entitled to under the law.

Those three questions, if the Court rules against us, we will take it to the Court of Appeals on those questions.

Now, if we don't prevail in the Court of Appeals, then I think the only course left to us would be to take the case back and give them a hearing.

Mr. Hughes: Your Honor, I have only one comment on that: I think the second or third issue Mr. Toomey stated, in effect it would be stipulated that we had not received the hearing to which we were entitled.

Mr. Toomey: No.

Mr. Hughes: If that is left open, we are back to the issue of fact. If the question of whether we had an adequate hearing under the statute, under the due process procedural requirement, and under the administrative code, if that question is open, then I think we should have a full record established.

Now, if that issue is conceded, if the Government, for purposes of this, would concede the issue that we did not have a hearing, and simply argue the jurisdiction of the Court, I would be perfectly willing to do that. But if it becomes a question of the other issue being left open, then I think the Appellate Court should have the fullest possible record of what kind of a hearing was held; and that is why we have held, and I think Judge Curran felt whether there was a hearing was an issue of fact; and that is why we are still here today.

If that wasn't the case a year ago——

Mr. Toomey: The record of the hearing is an exhibit to our motion in this case. I mean, there it is. If it was inadequate, your Honor can decide it, and so can the Court of Appeals. Counsel has constantly suggested throughout this litigation that there is a question of fact in this case. I cannot see it. Of course, that is one of the questions on our motion for summary judgment.

The Court: I have read the affidavits, and it seems to me that the facts could be stipulated. I am encouraged to say that by what you gentlemen have said just now on that point. I had the impression that counsel for the claimant

had the idea the claim was being submitted on a point of law.

Mr. Toomey: On the qualifications.

The Court: Yes.

And they did not at that hearing go into the matter of valuation. But I also understand that they had filed already some affidavit in support——

Mr Toomey: No question about it.

The Court: And now the Commission takes the stand that what you have filed and what they did is all you are entitled to under the law, even if you were somewhat beguiled to inactivity.

Mr. Hughes: It goes beyond that, your Honor, because their own regulations had stipulated that the hearing was limited to questions raised in the proposed decision, and Mr. Clay, the Commissioner, himself, had so stated to Congress. I believe the attorneys who were representing claimants were certainly entitled to assume that that was the case.

The Court: But still they are arguing.

Mr. Hughes: That is their argument. I agree that regardless of what they did, that is it.

The Court: What actually was done there is no dispute about?

Mr. Toomey: I can't see any dispute. I mean, here is the record of what was done. We see what was done in the record.

Now, the only question, it seems to me, is, was that enough, under the statute?

The Court: Has the Commission authority under the statute to say that is enough? That is the point. You say the law authorized them to determine the evaluation by their own investigation and by hearings. And they say that affidavits or supporting papers were filed showing your contention as to evaluation, and that is all you are entitled to.

Mr. Hughes: And we are not entitled to see what their evidence was. That is their contention.

The Court: And that would be a question of law.

Mr. Toomey: I think so.

Mr. Hughes: May I ask counsel one question?

We filed an affidavit in support, or rather in opposition, for your motion for summary judgment. I understand you do not have any answering affidavits to file.

Are you willing to stipulate, counsel, that the facts stated in that affidavit are correct, because we may possibly be able to arrive at that kind of a stipulation.

Mr. Toomey: I would like to, and I imagine they are, but in the time since I received the affidavit, which actually cannot get into my hands personally until Monday morning, I turned them over to the appropriate people in other agencies. But so far as that is concerned, we don't know. I mean, we haven't been able to find out and check the preciseness of those allegations. So that I just don't at this time feel free to so stipulate.

The Court: Was there a transcript of the testimony at the hearing?

Mr. Toomey: Oh, yes, it is before the Court now.

Mr. Hughes: Yes, that is part of the record.

My thought is, your Honor, that the record, if counsel will concede it, would consist of the deposition of Mr. Clay, which was taken a year ago in this litigation, and the transcript of the hearing before the Hearing Examiner, before the Commission, in 1954.

My affidavit, and of course the pleadings, and perhaps that is all. I don't know.

Anything else?

Mr. Toomey Not that I know of.

Mr. Hughes: Unless you have answering affidavits.

Mr. Toomey: At the moment I am not prepared to concede that the statements in the affidavit are entirely accurate. As I say, I have no reason to suppose they aren't, but I just don't know.

Mr. Hughes: The only thing is, this is motion for summary judgment. The question is, whether the questions raised——

Mr. Toomey: For the purpose of the motion, they have to be taken as true.

Mr. Hughes: I am not pressing you, but I want to know what your position is, because I am willing to stipulate if my affidavit is uncontested. If there are questions of fact, then I think there should be a full record on trial.

The Court: Well, they are conceded for the purpose of the motion, certainly.

Mr. Toomey: That is true, your Honor.

The Court: And I would be surprised if there is any occasion for taking of testimony, if it is all of record, anyway. And when the time comes and you have had an opportunity to examine the affidavit in detail, I would think that you gentlemen could agree upon a stipulation.

Mr. Hughes: I am perfectly willing.

May I ask Mr. Shay his feeling on that?

Mr. Shay: I feel that is the correct approach.

Your Honor, I think, as you have stated yourself, you would be empowered on such a statement of the opposing counsel that the affidavit, for the purposes of the motion for summary judgment, must be deemed to be true. On that I think the record could be complete, in order to go to the Court of Appeals, if necessary. I agree with your Honor.

The Court: Very well.

Mr. Toomey: One other thing, by the way: Another thing we would like to stipulate would be that the contents of his affidavit are true.

Mr. Hughes: I think the contents, as I recall, refer to that brief session in Judge Curran's chambers, about the admissibility of papers. I think we will be perfectly willing to concede that, your Honor.

The Court: What you want to present at this time is the question of the jurisdiction of this Court?

Mr. Hughes: May I add one more supplemental point, before we leave this?

I am slightly disturbed about this fact: At the time of the deposition of Mr. Clay in this action, we asked for the production of certain documents which we thought we should see. Judge Curran ruled simply in chambers, and without briefs, or anything else, an informal argument, that at that stage we could not see them.

Now, of course, if this matter goes up on stipulation of facts, the answer will be that we will never see them. We had intended to raise that question again with the trial judge, thinking that with the additional evidence that would then be available, and with additional briefing of the intention as to the papers, and so forth, we probably would be able to get a ruling to see those papers. That is the only reservation I have about this. But perhaps we could leave that open until Mr. Toomey is ready to tell us he would at least stipulate the facts in the affidavit.

There are questions of practice here that are barred on stipulation of fact.

The Court: You will never need that information that you seek until a hearing is granted.

Mr. Hughes: I think that is true, your Honor. I think that is correct. I would be willing to agree to that.

Mr. Shay: Yes, I think so.

Mr. Toomey: I think we can do this: I think that we are willing to let this case stand or fall on the record as it is now before the Court.

Now, that, of course, means your affidavit is uncontradicted.

Mr. Hughes: You are ready now to stipulate that?

Mr. Toomey: We are willing to say that if on the record before the Court now the Government is wrong in all its arguments, then the thing should be taken back.

The Court: Well, all I think you have to argue here, and I have already indicated that I would not reverse a ruling that Judge Curran had made, you need not argue that question.

The question is: Has this Court jurisdiction over the case, and has it power to make any order?

Mr. Toomey: And secondly, if so, on the record before the Court, did the plaintiff get from the Commission what it was entitled to, under the Act?

Mr. Hughes: I think as long as the record is now stipulated and there will be no answering affidavit, as I understand it, I think we are willing to do that, if that is my understanding, that there will be no answering affidavit.

Mr. Toomey: There will be no answering affidavit, as I understand it. So the case will stand or fall on the record before your Honor today. Therefore, it seems to me, I might suggest this, that if the Government does not prevail on its motion this morning, that the Court, probably, instead of entering—well, you would enter preliminary or entertain cross motion or summary judgment, in order to get a final judgment.

Mr. Hughes: I am willing now, your Honor, now that the record is to be stipulated, that we are, in effect, making a cross motion.

I did not feel that we should do that until we knew whether there were going to be contested questions of fact, but now that it appears to be, I think, if it is agreeable with counsel on the other side, we are willing to have our papers deemed to be a cross motion for summary motion.

Is that agreeable?

Mr. Toomey. Actually it makes no difference.

The Court: Very well.

The record will show that.

Mr. Toomey: May it please the Court, your Honor has indicated that you have read the papers, so I won't go into any great detail of argument.

I think probably what I should do is merely to emphasize the point which the Government thinks is controlling in this case.

(Whereupon, argument was presented by counsel.)

Memorandum and Order.

UNITED STATES DISTRICT COURT (118

FOR THE DISTRICT OF COLUMBIA

CA #247-55

[SAME TITLE]

WILKIN, District Judge (By Designation):

This case was submitted on the pleadings, the record, motions for summary judgment, oral argument, briefs of the parties, and memorandum by Amici Curiae.

This court is constrained to sustain the motion of the defendants for summary judgment in their favor by the decision of the Court of Appeals of this Circuit in *Edith Neuman De Vegvar* v. *Gillilland, et al.*, 228 F. 2d 640.

Counsel for the plaintiff contend that this case should be distinguished from the De Vegvar case. There are some differences, but they are not sufficient to exempt this case from the broad language used in the decisions of the De Vegvar claim. If this case is to be distinguished from the former ruling, the Court of Appeals should make the distinction.

Counsel for defendants admitted that the plaintiff had not been given a hearing by the Commission after determination by the Commission of the amount of the award to plaintiff. Defense counsel contended, however, that the hearing, which was held after the plaintiff's claim had been disallowed, was a compliance by the Commission with the requirements of the Statute. Counsel for plaintiff insisted that they had been precluded from offering evidence as to

119) the amount of their claim by the statement of the Commission agent, "that your testimony be directed solely to those phases of the claim which as indicated in the proposed decision seem to be in doubt."

It appears from the record that counsel for plaintiff believed that only the legal qualification of the claim was involved in that hearing, and they, therefore, requested a further hearing for consideration of the amount of the claim. It was admitted that some evidence as to the value of the claim had been submitted by the plaintiff, and counsel for the defendants insist that the claimant was afforded the opportunity prescribed by the Statute. The determination of that issue by the Commission does not come within the classification mentioned in the De Vegvar opinion of matters which are subject to judicial intervention.

Judgment for defendants, at plaintiff's costs.

R. N. WILKIN
U. S. District Judge

Washington, D. C.
May 25, 1956.

Notice of Appeal

UNITED STATES DISTRICT COURT (120

FOR THE DISTRICT OF COLUMBIA

C. A. 247-55

[SAME TITLE]

To the Clerk of the above entitled court, to Whitney Gillilland, Henry J. Clay, and Pearl Carter Pace, members of the Foreign Claims Settlement Commission, and George M. Humphrey, Secretary of the Treasury, defendants, and Oliver Gasch, Esq., United States Attorney, for defendants.

You and each of you will please take notice that the American and European Agencies, Inc., plaintiff above named, hereby appeals to the United States Court of Appeals for the District of Columbia Circuit, from the order and judgment made and rendered herein on the 25th of May, 1956, and docketed on May 28, 1956, upon motion of defendants for summary judgment or dismissal of complaint against plaintiff.

/s/ PERCY A. SHAY

Percy A. Shay
Attorney for plaintiff
Wyatt Building
777—14th Street, N. W.
Washington 5, D. C.

Dated June 20, 1956

Deposition of Commissioner Henry J. Clay
Taken June 6, 1955

Summary of Excerpts

Appearances for the plaintiff: MESSRS. SHAY, HUGHES and MASON.

Appearances for the defendants: MESSRS. TOOMEY and ARNOLD.

In answer to questions, the witness testified as follows:

That the Commission had employed expert appraisers and that one of them had made a report of his examination of the books of Fallersa. On advice of counsel, the witness refused to produce the report or allow examination thereof (pp. 14-23). This refusal was sustained by Judge Curran, the report being considered an inter-office memorandum and, therefore, privileged (23).

• • •

The witness was directed by counsel not to state whether the memorandum was "read by the Commissioners and considered as part of the record in the case before the Commission", on the ground that the question attempted to probe the mental processes of a quasijudicial body in an effort to determine how its decision was reached (26, 6), but the witness thereafter stated after consulting counsel that the memorandum was not considered a part of the record or evidence in the case (81, 82).

In compliance with the subpoena duces tecum the witness produced an appraisal of the physical assets of Fallersa made by the Yugoslav Government and stated that this document was a part of the record in the case. The witness did not know whether plaintiff's attorneys had in fact been advised of the Commission's receipt of this document; he was quite sure, however, that they were well aware of such receipt. Members of the Commission staff had held a number of conversations and maintained constant contact with plaintiff's attorneys in connection with the case. The

Commission did not as a matter of practice permit claimants or their attorneys to examine the reports from the Commission's field agents, but there was no hard and fast rule in this regard, this being considered a matter within the Commission's discretion. It was the policy of the Commission to try to cooperate in every respect with claimants' attorneys, and if there appeared to be a serious problem requiring the development of additional evidence the claimant or his attorney was called in and informally advised of the situation. The witness did not know whether the claimant or its attorneys had been advised that the Commission had received documents or reports indicating that the claim was worth only $12,300 and did not know whether the claimant or its attorneys had seen either the report of the Commission's expert appraiser or the report of the Commission's field agents (27-40).

That the Commission made its finding of fact relative to the evaluation of the properties involved in this claim by its decision of December 30, 1954, and that the proposed decision of November 26, 1954 denied the claim for reasons unrelated to evaluation and consequently did not specifically refer to evaluation and the Commission had made no determination on that issue (41-42).

The witness stated that he interpreted the regulations of the Commission as permitting the hearing to be guided by the plaintiff's request to be heard on certain types of objections, and that it was not the Commission's understanding and their ruling that the hearing was limited to specific factual and legal findings which had been made by the Commission prior to the hearing and upon which the claimants desired to produce additional evidence (44-50).

That the record in a case before the Commission consisted, in general, of the claimant's claim and documentation thereof; a report by the field staff of the Commission;

an appraisal from the Yougoslav Government of the properties involved; where necessary, reports of expert appraisers; and, in some cases, the report of a Commissioner who may have visited the properties (75-76). He believed that an Acting Member of the Commission who had not participated in the final decision of this case had visited the properties here in question (75).

That in this case, no memorandum, proposed decision, finding, or other report was filed with the Commission by its Hearing Examiner, Mr. Harry N. Stein (28). On advice of counsel, the witness refused to state whether or not the facts of the case were discussed by the Commissioners with the Hearing Examiner (28).

That he did not believe that the Examining Attorney had made a recommendation as to the adjudication of the claim (78).

That it was the function of the Supervising Attorney to examine the case folder on questions relating to an evaluation to make sure that there was sufficient evidence in the folder concerning evaluation, and that the witness did not believe that the Supervising Attorney had made a recommendation in this case but that he had participated in a discussion of the case in the Commission's office (78-80).